No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ET AL., PETITIONER

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 96-55929, 97-55479

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL., PLAINTIFFS
AND
AIAD BARAKAT; NAIM SHARIF; KHADER MUSA HAMIDE; NUANGUGI JULIE MUNGAI; AYM MUSTAFA OBEID; AMJAD OBEID; MICHEL IBRAHIM SHEHADEH; BASHAR AMER, PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL; HAROLD EZELL; C.M. MCCULLOUGH; DORIS MEISSNER, COMMISSIONER, INS; ERNEST E. GUSTAFSON, PERSONALLY AND IN HIS CAPACITY AS PAST DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE; RICHARD K. ROGERS, DISTRICT DIRECTOR, PERSONALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE; GILBERT REEVES, PERSONALLY AND IN HIS CAPACITY AS AN OFFICER OF THE IMMIGRATION AND NATURALIZATION SERVICE; IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

[Argued and Submitted June 23, 1997]

[Decided July 10, 1997]

Before: D.W. NELSON and CANBY, Circuit Judges, and TANNER, District Judge.*

D.W. NELSON, Circuit Judge:

The central issues in this case are (1) whether 8 U.S.C. § 1252(g), as amended by the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, applies retroactively; and (2) whether the provision eliminates federal jurisdiction over a case such as this one, in which aliens have filed a federal suit challenging deportation proceedings on First Amendment grounds before a final order of deportation has been issued. We conclude that subsection (g) applies to pending cases but that the provision does not bar jurisdiction in this case. Because subsection (g) states that it applies "except as provided in this section," we conclude that the amended version of 8 U.S.C. § 1252(f), which permits certain collateral challenges to INS action, also applies by incorporation. We find that subsection (f) allows the instant suit because the factual record for the Plaintiffs' First Amendment claims cannot be developed in administrative proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the decision of the Immigration and Naturalization Service ("INS") to commence deportation proceedings against seven native Palestinians and one native Kenyan affiliated with the Popular Front for the Liberation of Palestine ("PFLP"). The complete factual history of this case is set forth in this court's prior opinion affirming the

* The Honorable Jack E. Tanner, Senior District Judge for the Western District of Washington, sitting by designation.

grant of a preliminary injunction to six of the aliens on First Amendment grounds. *See American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066 (9th Cir.1995) ("*American-Arab I*"). To summarize, briefly:

The eight named aliens in this case, Aiad Barakat, Naim Sharif, Khader Musa Hamide, Nuangugi Julie Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Bashar Amer, ("Plaintiffs"), have participated in PFLP events to varying degrees. The PFLP is an international organization with ties to Palestine, and which the district court concluded is engaged in a wide range of lawful activities, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political organizing." The government avers that the PFLP is an international terrorist and communist organization, but does not dispute the district court's finding that the organization conducts lawful activities.

In January, 1987, the INS arrested the Plaintiffs and initiated deportation proceedings against them. Six of the Plaintiffs in this case, Barakat, Sharif, Mungai, Ayman Obeid, Amjad Obeid, and Amer, ("the Six") were living in this country under temporary student or visitor visas at the time that this case was filed. The remaining two, Hamide and Shehadeh, were permanent resident aliens. The INS charged all of the Plaintiffs under the McCarran-Walter Act of 1952 ("1952 Act"), which provided for the deportation of aliens "who advocate the economic, international, and governmental doctrines of world communism." 8 U.S.C. § 1251(a)(6)(D) (1988). In addition, the INS charged the Six with non-ideological, technical visa

violations. Former FBI director William Webster testified to Congress that " '[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation.... [I]f these individuals had been United States citizens, there would not have been a basis for their arrest.'" *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987), *quoted in American-Arab I*, 70 F.3d at 1053.

The INS subsequently dropped the ideological charges against the Six and reformulated the 1952 Act charges against Hamide and Shehadeh. Shortly thereafter, INS regional counsel William Odencrantz indicated "that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP." *American-Arab I*, 70 F.3d at 1053.

Following the repeal of the 1952 Act, the INS commenced proceedings against Hamide and Shehadeh under the "terrorist activity" provision of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), codified as amended at 8 U.S.C. § 1251(a)(4)(B) (rendering deportable "[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity").[1]

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[1] For the purposes of the 1990 Act, terrorist activity consists of the commission

> in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time.

8 U.S.C. § 1182(a)(3)(B)(iii).

The Plaintiffs filed this federal action to contest the deportation proceedings on First Amendment grounds. They claimed that the INS had singled them out for selective enforcement of the immigration laws in retaliation for their constitutionally protected associational activity. The district court held that it lacked jurisdiction over the claims of Hamide and Shehadeh but granted a preliminary injunction staying the immigration proceedings against the Six. On appeal, this court upheld the injunction and concluded that the court had jurisdiction over the claims of Hamide and Shehadeh. *American-Arab I*, 70 F.3d at 1071. The district court then entered an injunction staying the proceedings against Hamide and Shehadeh.

The government now appeals the district court's decision refusing to dissolve the existing preliminary injunction and granting the injunction in favor of Hamide and Shehadeh. Relying on new evidence submitted to the district court following this court's decision in *American-Arab I*, the government argues that the deportation proceedings were initiated for permissible reasons. Specifically, the government cites to materials detailing the Plaintiffs' support of PFLP fundraising activities and argues that under the applicable First Amendment standard, the Plaintiffs may be sanctioned for this behavior.

In addition, while this appeal was pending, the government filed motions to dismiss the case both with the district court and with this panel. The govern-

ment contends that 8 U.S.C. § 1252(g), as amended by IIRIRA, deprives the federal courts of jurisdiction over all claims such as those at issue here, except on review of final deportation orders. The district court has determined that the new statute does not eliminate jurisdiction in this case, and the appeal of the district court's decision has been consolidated with this case.

STANDARD OF REVIEW

The interpretation of a statute is a question of law, which we review de novo. *United States v. Doe*, 109 F.3d 626, 629 (9th Cir.1997).

We review a decision regarding a preliminary injunction for an abuse of discretion. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996). A district court abuses its discretion "if the court bases its decision on an erroneous legal conclusion or on clearly erroneous findings of fact." *American-Arab I*, 70 F.3d at 1062.

DISCUSSION

I. *Jurisdiction*

IIRIRA amends section 242(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(g), to provide:

> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Pub.L. No. 104-208, § 306(a). The government argues that subsection (g) applies retroactively and eliminates federal jurisdiction over this case at this stage in the proceedings. While we agree that subsection (g) applies, we hold that it does not deprive the court of jurisdiction in this case.

IIRIRA explicitly provides for the retroactive application of subsection (g).[2] Section 306(c) states that

> the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and *subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)) [8 U.S.C. § 1252(g)], shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.*

Pub.L. No. 104-208, § 306(c) (emphasis added). Thus, the provision carves out an exception to the general rule, specified in section 309(c), that IIRIRA does not apply to pending cases.[3]

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[2] As IIRIRA expressly addresses the retroactivity of the relevant jurisdictional provision, we need not apply the default rules elaborated in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280-81, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994).

[3] Section 309(c) provides:

> (c) Transition for Aliens in Proceedings (1) General Rule that New Rules Do Not Apply.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in

Two circuits already have drawn this conclusion. The D.C. Circuit recently held that in a federal suit challenging the execution of a deportation order, the provision governed even though Congress enacted IIRIRA "[s]ubsequent to the District Court hearing." *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997). And in a decision holding that the effective date of amended 8 U.S.C. § 1252(g) was the same as the rest of the IIRIRA amendments (April 1, 1997), the Seventh Circuit has concluded that "the reference to subsection (g) in section 306(c) is meant only to provide an exception to section 309(c)'s nonretroactivity, so that when IIRA comes into effect on April 1, 1997, subsection (g) will apply retroactively, unlike the other subsections." *Lalani v. Perryman*, 105 F.3d 334, 336 (7th Cir. 1997). We follow the D.C. and Seventh Circuits and conclude that subsection (g) applies retroactively.

We also conclude, however, that subsection (g) incorporates certain exceptions when it applies to pending cases. Subsection (g) states that "except as provided in this [new] section, [8 U.S.C. § 1252]," no court can consider any claim arising from a decision of the Attorney General "to commence proceedings, adjudicate cases, or execute removal orders against any alien." The provision thus expressly contem-

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exclusion or deportation proceedings as of the title III-A effective date [April 1, 1997]-

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

plates the applicability of other jurisdictional amendments to 8 U.S.C. § 1252. It is true that retroactive application of the entire amended version of 8 U.S.C. § 1252 would threaten to render meaningless section 306(c) of IIRIRA, which provides that in general, the narrow set of jurisdictional reforms codified at 8 U.S.C. § 1252 do not govern in pending cases. Yet a reading of subsection (g) that did not incorporate any exceptions would contradict the plain meaning of the text of (g).

Moreover, such a reading would be illogical. Divorced from all other jurisdictional provisions of IIRIRA, subsection (g) would have a more sweeping impact on cases filed before the statute's enactment than after that date. Without incorporating any exceptions, the provision appears to cut off federal jurisdiction over all deportation decisions. We do not think that Congress intended such an absurd result. We believe that when it applies to pending cases, (g) must apply along with at least some of the other provisions of section 1252, as amended by IIRIRA.

We must consider, then, which provisions of the amended version of 8 U.S.C. § 1252 are incorporated by reference into subsection (g) and whether any of these provisions preserve federal jurisdiction in this case. One candidate is 8 U.S.C. § 1252(f), which provides:

(f) Limit on injunctive relief

. . . .

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court)

> shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.*

Pub. L. No. 104-208, § 306(a) (emphasis added).[4] Because this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the Plaintiffs' claims.

In determining whether subsection (f) applies, and in interpreting its meaning, we are guided by the well-established principle that where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims. The Supreme Court has stated unequivocally that "serious constitutional question[s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) (internal quotation and citation omitted); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 & n. 12, 106 S. Ct. 2133, 2141 & n. 12, 90 L.Ed.2d 623 (1986) (construing Medicare statute as permitting judicial review of regulations promulgated under the statute); *Johnson v. Robison*, 415 U.S. 361,

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[4] "Part IV of this subchapter" refers to statutory provisions governing inspection, apprehension, examination, exclusion, and removal of aliens. *See* 8 U.S.C. §§ 1221-1251.

373-74, 94 S. Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974) (interpreting statute appearing to bar all review of veterans-benefits determinations as permitting judicial review of constitutional challenges due to lack of "clear and convincing" evidence that Congress intended to eliminate review of constitutional claims). Under subsection (f), individual aliens would appear to be able to seek judicial review of constitutional claims such as those at issue here.

The government contends that subsection (g) alone applies and that the provision does not cut off federal review of constitutional claims because it allows courts to consider such claims on review of final orders of deportation. The difficulty with this position is that the text of (g) alone does not appear to authorize judicial review of final orders of deportation. The provision can be read as authorizing such review only if it is read in conjunction with other subsections, such as the amended version of 8 U.S.C. 1252(b)(9), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

Pub.L. No. 104-208, § 306(a). The government makes the alternative argument that if subsection (b)(9) governs, the provision clearly limits judicial review, including review of all constitutional claims, to final orders of deportation.

We disagree. Even if subsection (b)(9) applies along with subsection (g), we believe that subsection (f) must be incorporated as well, and that (f) must be read to preserve judicial review of constitutional claims such as the ones at issue here. Any other reading would present serious constitutional problems. As we determined in *American-Arab I*, and as the government has conceded, neither the immigration judge ("IJ") nor the Board of Immigration Appeals ("BIA") has the authority to consider a selective enforcement claim during a deportation proceeding. *American-Arab I*, 70 F.3d at 1055. Moreover, a selective enforcement claim is not purely legal but rather requires factual proof. *Id.* Thus, the factual record necessary to the adjudication of such a claim would not be available to a federal court reviewing a final deportation order. *Id.* at 1055-56.

In *McNary v. Haitian Refugee Center, Inc.*, the Supreme Court drew a similar conclusion. 498 U.S. 479, 483-84, 111 S. Ct. 888, 891-92, 112 L.Ed.2d 1005 (1991). At issue in *McNary* was a provision of the INA that the government argued limited judicial review to final orders of deportation. Because the factual record necessary to the consideration of the plaintiffs' constitutional and procedural statutory claims could not be developed in administrative proceedings, the Court construed the provision as preserving general federal jurisdiction over the claims at issue in the case. *Id.* at 493-94, 111 S. Ct. at 896-97.

The government's argument that 28 U.S.C. § 2347(b)(3) enables federal appellate courts to remedy the factfinding deficiencies of administrative deportation proceedings in cases such as this one is unpersuasive. Section 2347(b)(3) allows an appellate court

reviewing an agency determination to transfer proceedings to a district court for additional factual development in certain circumstances. However, we have held that this provision is not available on review of deportation proceedings. *American-Arab I*, 70 F.3d at 1056-57; *Ghorbani v. INS*, 686 F.2d 784, 787 n. 4 (9th Cir. 1982). Because the INA limits appellate review to the administrative record, the statute "precludes application of the procedures . . . that permit transfer of a case to a district court for a hearing, under circumstances set forth at 28 U.S.C. § 2347(b)(3)." *Id.* While IIRIRA repeals 8 U.S.C. § 1105a(a), which contained the provision cited in *American-Arab I* and *Ghorbani* confining appellate review to the administrative record, IIRIRA adopts the same requirement. 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based.") Thus, the statutory basis for *American-Arab I* and *Ghorbani* remains the same, and these decisions still control.

In addition, IIRIRA expressly forecloses the appellate courts from remanding such cases to the IJ for further factual development under a related provision, 28 U.S.C. § 2347(c) (allowing appellate court to remand to agency for further factual development in certain circumstances). *See* 8 U.S.C. § 1252(a)(1) (as amended). The government's argument that IIRIRA's express preclusion of section 2347(c) proceedings by negative inference allows proceedings under section 2347(b)(3) does not make sense because the express statutory elimination of section 2347(b)(3) proceedings then would have been unnecessary. Prior to the enactment of IIRIRA, while some cir-

cuits had allowed remand under section 2347(c), even those circuits which permitted remand to the agency under section 2347(c) did not allow proceedings under section 2347(b)(3). *See American-Arab I*, 70 F.3d at 1057; *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977). Thus, Congress needed to act only to cut off the availability of section 2347(c).

Nor does review of a final order of deportation by habeas corpus offer adequate redress for the Plaintiffs' claimed constitutional injuries. The limitations of the new statute on habeas relief remain unclear. *See, e.g., Duldulao v. INS*, 90 F.3d 396, 399 n. 4 (9th Cir. 1996) (declining to reach issue of whether section 440(a) of Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), as incorporated by IIRIRA, limits habeas review); *see also Yang v. INS*, 109 F.3d 1185, 1196 (7th Cir. 1997). Some form of statutory habeas relief may remain available, *see Fernandez v. INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir.1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 1842, 137 L.Ed.2d 1046 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27, 31 (2d Cir. 1996), and, indeed, in certain cases habeas review may be constitutionally required, *see Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996). Some courts have relied on the likely availability of habeas to preserve the constitutionality of the jurisdiction-narrowing provisions of the new statute. *See, e.g., Ramallo*, 114 F.3d at 1214; *Chow*, 113 F.3d at 668. However, even assuming that habeas relief remains available, it would not provide a sufficient avenue for review of the Plaintiffs' claims in this case. Although habeas was available under the old statutory structure, in *American-Arab I* this

court held that *prompt* judicial review of the Plaintiffs' claims was required because violation of Plaintiffs' First Amendment interests would amount to irreparable injury that "cannot be vindicated by post-deprivation remedies." *American-Arab I*, 70 F.3d at 1057.

In sum, we conclude that while subsection (g) applies to pending cases, it incorporates subsection (f). Moreover, even if (b)(9) is incorporated along with (f), we read (f) as permitting federal review of constitutional claims such as those at issue here, because no other avenues of meaningful federal review remain available. Accordingly, the district court may retain jurisdiction over this case.

II. *Preliminary Injunction*

This court already has upheld the preliminary injunction in favor of the Six. In *American-Arab I*, we held that "[t]he aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights." 70 F.3d at 1066. We reached this conclusion because we affirmed the district court's finding that the Plaintiffs had made out a prima facie case of selective enforcement by showing (1) others similarly situated were not prosecuted (disparate impact)[5] and (2) the prosecution was

[5] The district court selected as a control group "those aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." *American-Arab I*, 70 F.3d at 1063. Before the district court, the Plaintiffs introduced copious evidence that the government did not seek to deport aliens affiliated with

based on an impermissible motive (discriminatory motive). *Id.* at 1062. We determined that the Plaintiffs had made a sufficient showing of discriminatory motive by demonstrating that the government targeted them "because of their associational activities with particular disfavored groups," and because the government did not establish that the Plaintiffs had the "specific intent to further [any alleged] . . . illegal aims" of those groups. *Id.* at 1063 (quoting *Healy v. James*, 408 U.S. 169, 186, 92 S.Ct. 2338, 2348, 33 L.Ed.2d 266 (1972)). Following our decision, the district court granted an additional preliminary injunction that included Hamide and Shehadeh.

The government has now presented new evidence in the district court showing that the Plaintiffs participated in fundraising activities for the PFLP. The government argues that the submission of this evidence has two consequences: First, the government contends that there is no longer sufficient evidence to sustain the district court's finding of disparate impact. Second, the government maintains that the standard under which the district court analyzed the evidence of discriminatory motive is no longer applicable. In evaluating the preliminary injunction in favor of the Six, we need not consider either of the government's arguments. As applied to

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groups such as the Nicaraguan Contras, the Afghanistan Mujahedin, the Mozambique RENAMO, anti-Castro Cuban groups, and the Vietnamese Montagnards, which have advocated violence and the destruction of property. The Plaintiffs also submitted evidence showing that the government rarely took action against nonresident aliens for technical visa violations.

the preliminary injunction in favor of Hamide and Shehadeh, both arguments are without merit.

A. Preliminary injunction in favor of the Six

With respect to the preliminary injunction granted in favor of the Six, we need not address either of the government's arguments. The government has not demonstrated changed circumstances. *See Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993) (noting that modification of a preliminary injunction requires changed circumstances that would render continuance of injunction in its original form inequitable); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir. 1963) (same). Moreover, it is improper to use a motion to dissolve an existing preliminary injunction to "try . . . to relitigate on a fuller record preliminary injunction issues already decided." *American Optical Co. v. Rayex Corp.*, 394 F.2d 155, 155 (2d Cir.1968).

The district court concluded, and the government does not appear to dispute, that "the government's new 10,000-page submission was available to the government at the time the preliminary injunction was entered; the government simply chose not to litigate the facts at that time." Up until that point, the government had argued that the Plaintiffs did not possess the same First Amendment rights as citizens. Because the only change in circumstances is of the government's own making, resulting from its decision to change its litigation strategy, we conclude that it is equitable to continue the original injunction staying proceedings against the Six without consideration of the new evidence.

B. Preliminary injunction in favor of Hamide and Shehadeh

1. Disparate impact

The government contends that the district court's finding of disparate impact is clearly erroneous because the Plaintiffs have failed to produce sufficient evidence showing that the INS refrained from deporting fundraisers in other terrorist organizations. Yet the government does not dispute the district court's conclusion that the INS sought to deport the Plaintiffs because of mere membership in the PFLP. As Plaintiffs did show that members of numerous other organizations advocating violence and the destruction of property were not deported, the comparison with aliens who engaged in fundraising for other terrorist organizations is unnecessary.

Even if such a comparison were required, the Plaintiffs have produced sufficient evidence to this effect. The Plaintiffs identified Toryalai Ali, a permanent resident alien living in San Diego who represented a Mujahedin guerrilla organization and who contributes approximately half of his income to the group. In addition, the Plaintiffs introduced evidence to show that the government did not seek to deport aliens who distributed a newsletter designed to build support for the Nicaraguan contras and which included an appeal to send money to support the Nicaraguan Democratic Forces. The Plaintiffs also submitted asylum files obtained in discovery demonstrating that the INS did not move to deport 59 out of 65 members and material supporters of the Contras and Mujahedin.

The government's assertion that "the district court had no evidence regarding a proper control group for Hamide and Shehadeh, who are permanent resident aliens" is also incorrect. As discussed above, the record contained evidence that Toryalai Ali, a permanent resident alien, was not deported despite his leadership role and financial contributions to a sub-group of the Mujahedin. The record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property.

The district court did not clearly err in finding that the Plaintiffs established disparate impact.[6]

2. Improper motive

The district court found that, even after the government made its supplemental evidentiary submission, there was "no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." The government does not contest this finding. Accordingly, for the purposes of the First Amendment analysis, we assume that the Plaintiffs did not possess specific intent.

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[6] The government's suggestion that the Supreme Court's recent decision in *United States v. Armstrong*, —— U.S. ——, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996), upsets the disparate impact finding is without merit. Armstrong does not alter the standard for establishing disparate impact. Rather, the case holds that failure to make any showing that similarly situated others were not being prosecuted defeats the selective prosecution claim. *Id.* at ——, 116 S.Ct. at 1487. Here, as discussed above, the Plaintiffs submitted extensive evidence that the government did not seek to deport similarly situated others.

The government now tries to evade the specific intent standard we articulated in *American-Arab I*. Relying on the new evidence of fundraising activity, the government contends that a more relaxed First Amendment inquiry is appropriate. Because activity, rather than mere association, is at issue, the government maintains that the case should be analyzed under the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968) (holding that government has more latitude in restricting expressive conduct than in curtailing pure speech).

Yet in *American-Arab I* we already considered this question. We emphasized that the government was required to show that the Plaintiffs had the "specific intent" to engage in illegal group aims because the Plaintiffs had demonstrated that they were targeted for their "associational activities with particular disfavored groups." 70 F.3d at 1063 (emphasis added). In making this statement, we had before us evidence that these associational activities included fundraising. Thus, we already have made it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals.

O'Brien is inapplicable in a case such as this one, in which the restrictions are in effect content-based. *See RAV v. City of St. Paul*, 505 U.S. 377, 385, 112 S. Ct. 2538, 2543-44, 120 L.Ed.2d 305 (1992) (citing to *O'Brien* and noting that "[n]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses"). Here, the central issue is whether the government impermissibly targeted the Plaintiffs due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property. Thus, the stringent First Amendment standard articulated in *American-Arab I* continues to apply.

Moreover, the government has not challenged the factual finding made by the district court that the INS targeted the Plaintiffs for their mere association with the PFLP. Indeed, in the prior appeal the government conceded that citizens would not have been treated in the same fashion. *American-Arab*, 70 F.3d at 1063. Therefore, regardless of whether the government has demonstrated that the Plaintiffs were also targeted for fundraising activity, the district court's conclusion that the Plaintiffs have made a prima facie showing of the government's improper motive is not clearly erroneous.

CONCLUSION

For the foregoing reasons, we conclude that IIRIRA does not eliminate federal jurisdiction at this stage in the proceedings. We also affirm the district court's decision denying the government's motion to dissolve the preliminary injunction on behalf of the Six and granting the preliminary injunction on behalf of Hamide and Shehadeh.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-02107 SVW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL, PLAINTIFFS

v.

JANET RENO, ET AL, DEFENDANTS

[Filed: Feb. 7, 1997]

ORDER RE DEFENDANTS' MOTION TO DISMISS

I. BACKGROUND

On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Act" or "IIRIRA"), Pub. L. No. 104-208, 100 Stat. 3009 (1996). Defendants rest their motion on one provision in the IIRIRA, § 306(a), which amends § 242(g) of the Immigration and Nationality Act ("INA") (hereinafter "subsection (g)"). They argue that this provision deprives this Court of its jurisdiction to entertain plaintiffs' constitutional claims, and requires dismissal of the case and vacation of the injunctions.

Subsection (g) states:

> EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf or any alien arising from the decision by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Section c of Section 306 of the of the IIRIRA sets forth the effective dates for the amendments to the judicial review provisions of the INA that were made by subsections (a) and (b) of Section 306. Section 306(c) states

> (c) Effective Date.
>
> (1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, *except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.*

IIRIRA § 306(c) (as amended by Act of October 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656, making technical corrections to Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (emphasis added).

As stated in Section 306(c), Section 309 establishes the effective date provisions for Sections 306(a) and 306(b). Section 309 states:

SEC. 309 EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—*Except as provided in this section and sections* 303(b)(2), *306(c)*, 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act.

IIRIRA § 309(a) (emphasis added).

The government's argument is straightforward. The instant action arises "from the decision or action by the Attorney General to commence [and] adjudicate proceedings" against the plaintiffs, and therefore falls squarely within the terms of the amended statute. In addition, section 306(c) of the 1996 Act makes clear that Congress intended the amended section 242(g) to apply to pending cases. Thus according to the plain language of section 242(g), this Court is divested jurisdiction over all of the claims that Plaintiffs have made in this case.

Plaintiffs contend that under the government's interpretation, subsection (g) violates "Article III, the First Amendment, and the Due Process Clause." However, Plaintiffs claim that the "serious constitutional questions" raised by Defendants' reading of subsection (g) can be avoided in several ways. Plaintiffs offer this Court several ways to "avoid" the alleged "serious constitutional questions raised by Defendants' reading of subsetion (g)."

(1) Defendants' motion is premature, because subsection (g) does not take effect until April 1, 1997.

(2) Congress expressly provided in the IIRIRA that none of the judicial review amendments in § 306 would apply to aliens in pending deportation proceedings as of April 1, 1997. Because Plaintiffs are all in pending deportation proceedings, Plaintiffs' "proceedings (including judicial review thereof) shall continue to be conducted without regard to [the §306] amendments." IIRIRA, § 309(c).

(3) Subsection (g) does not expressly bar review of *constitutional* claims, and thus it should be construed to preserve jurisdiction to entertain such challenges.

(4) Subsection (g) precludes judicial review of decisions to commence proceedings only where such review is not otherwise "provided in this section." But another provision in this section, according to Plaintiffs, explicitly provides for injunctive relief to "an individual alien against whom [deportation] proceedings . . . have been initiated." IIRIRA, § 306(a) (amending INA, §242 (f)) ("subsection f"). As individual aliens against whom deportation proceedings have been initiated, Plaintiffs argue that they are entitled under subsection (f) to seek an injunction against the deportation proceedings. Given that authorization, they claim that subsection (g) does not bar Plaintiffs' claim.

In the event that this Court finds that it cannot avoid the constitutional issues subsection (g) raises, Plaintiffs urge this Court to strike down the statute as unconstitutional.

II. Legal Analysis

A. Effective Date of Subsection (g)

1. Why the Effective Date of Subsection (g) is Important.

Plaintiffs claim that subsection (g) does not go into effect until April 1, 1997. Defendants claim that subsection (g) has been in effect ever since President Clinton signed IIRIRA into law on September 30, 1996. Why does this dispute matter?

Plaintiffs are not just trying to buy time. They argue both that subsection (g) does not go into effect until April 1, 1997 and that when it does go into effect it will not apply to Plaintiffs. IIRIRA § 309(c)(1) provides that for those aliens in deportation proceedings as of April 1, 1997, "the amendments made by this subtitle shall not apply," and "the proceedings [including judicial review thereof] shall continue to be conducted without regard to such amendments"—i.e., under prior law. The government has admitted this point elsewhere. Supplemental Brief for the Petitioner at 6, *INS v. Yang*, 65 U.S.L.W 4009, (Nov. 13, 1996) (stating that the § 306 judicial review amendments do not apply "in any case in which the administrative exclusion or deportation proceeding were instituted prior to April 1, 1997").

Defendants respond that § 306(c) dictates that subsection (g) applies "*without limitation* to claims arising from all past, pending, or future . . . deportation . . . proceedings under such Act." Plaintiffs reply that "this must be read consistently with the 'transition' rules, which provide that none of the judicial review amendments §306 applies to pending proceedings." The Court disagrees with Plaintiffs' reply. There is nothing "inconsistent" in the position that subsection (g) applies to pending cases. Plaintiffs have confused an exception with an inconsistency. Subsection (g) clearly states that it applies "without limitation." The "without limitation" language in subsection (g) makes it an exception from § 309(c)'s general rule that the new judicial review rules will not apply to pending cases. There is no logical inconsistency in reading a statute as establishing a general rule in one section and as making an exception to that general rule in another section. Any other reading of the statute would be "inconsistent" with the "without limitation" language in § 306(c).

Moreover, the "transition rules" give the Attorney General the option in pending deportation cases in which an evidentiary has commenced to elect to proceed under the new judicial review rules, by terminating the proceedings and initiating new proceedings. IIRIRA, § 309(c)(3). Thus, even if 309(c) does place a limitation on § 306(c), the Attorney General could terminate the old deportation proceeding and start again under the new rules. Plaintiffs' response to this scenario is unconvincing. They claim that the Attorney General is enjoined from this Court's order from "conducting further deportation proceedings" until plaintiffs selective prosecution claims are finally resolved. This argument, however, puts the cart before the horse. When section 242(g) goes into

effect it will strip this Court of jurisdiction over Plaintiffs' claims'. The Court's previous order will no longer have any force, and the Court will lack the authority to order any new injunctions. Only if subsection (g) does not apply to Plaintiffs claims would the Court be able to block the initiation of new proceedings under its standing injunction.

Plaintiffs further argue that subsection (f) of IIRIRA authorizes the very type of injunctive relief Plaintiffs seek here. Section 242 (f) precludes class-action relief, but expressly provides for injunctive relief for "an individual alien against whom [deportation] proceedings under such chapter have been initiated." IIRIRA, § 306(a)(2) (amending INA, § 242(f)).

Defendants respond with the claim that reading subsection (f) to authorize Plaintiffs' suit would render subsection (g) meaningless. Plaintiffs reply to this argument is persuasive. Subsection (g) by its own terms only precludes jurisdiction where its not otherwise provided in the judicial review amendments, and thus it explicitly contemplates that other provisions will in fact provide jurisdiction. Moreover, under Plaintiffs' reading, subsection (g) would still have meaning, for it would restrict to the court of appeals all challenges to commencement of proceedings and adjudication of cases that do not require injunctive relief or factual development beyond the scope of the deportation hearing. For example, an alien who claimed that his deportation proceeding has commenced without sufficient evidence would be barred by subsection (g) from seeking immediate judicial review of that claim. Similarly, an alien who challenged the adjudication of his case by objecting to the introduction of certain evidence would be required

by subsection (g) to seek review only in the court of appeals. But where, as here, individual aliens in deportation proceedings challenge the very proceedings themselves as selective prosecution in retaliation for their exercise of First Amendment rights, subsection (f) authorizes injunctive relief. Defendants' contrary position, according to Plaintiffs' would render meaningless the last clause of subsection (f), permitting "an individual alien" in deportation proceedings to seek injunctive relief. In Defendant's view, an individual alien in deportation proceedings could never seek injunctive relief.

However, subsection (f) does not take effect until April 1, 1997. Thus, while Plaintiffs could in theory seek an injunction under subsection (f) on April 1, 1997, nothing in subsection (f) provides a current basis for jurisdiction. In other words, the issue this Court faces is whether or not it has the authority to hear this action today, not whether several months from now it will have that power, thus, the importance of the effective date of subsection (g). If subsection (g) went into effect on September 30, 1996, the possible availability of subsection (f) will not avail Plaintiffs today.

2. The Effective Date of Subsection (g) was September 30, 1996.

The Court bears in mind that, as a matter of statutory construction, a statute is deemed effective immediately absent an express provision in the statute to the contrary. *United States v. Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986). Thus, the Court is confronted with three possibilities, two of which are winners for the government's position.

(1) Subsection (g) took effect immediately on September 30, 1996.

(2) Subsection (g) takes effect on April 1, 1997.

(3) The statute is ambiguous as to subsection (g)'s effective date. If the statute is ambiguous, the Court should follow the presumption that subsection (g) went into immediate effect on September 30, 1996.

Plaintiffs argue that Subsection (g) is just one part of a comprehensive revision of the judicial review provisions, and § 309(a) provides that the judicial review amendments generally do not take effect until April 1, 1997.

Given the effective date language in § 309(a), unless there is some specific contrary instruction, subsection (g) takes effect, along with the rest of the judicial review amendments, on April 1, 1997. Defendants point to § 306(c). Plaintiffs counter that § 306(c) merely describes the scope of subsection (g)'s application. It says nothing about when the provision actually takes effect, and applies without limitation to claims arising from past, pending, and future exclusion and deportation proceedings. But since nothing in § 306(c) states that subsection (g) takes effect immediately, its effective date is governed by § 309(a), and it takes effect April 1, 1997.

Plaintiffs strengthen their reading by pointing out that the language of subsection (g) would make no sense if it took effect before the rest of the judicial review provisions in § 306. Section 242(g)'s title is "EXCLUSIVE JURISDICTION," but if subsection (g) took effect before the rest of the judicial review

provisions, it would deny all judicial review of the claims described, rather than simply confirming that jurisdiction over such claims is governed "exclusively" by other sections of the judicial review amendments. In addition, subsection (g)'s opening clause, "Except as provided in this section," would be meaningless if subsection (g) took effect before the rest of the judicial review section—the clause would have no referent. Thus, in order to make subsection (g) meaningful, it must be read, according to Plaintiffs to take effect at the same time that the rest of the judicial review section does.

Plaintiffs' argument is not entirely convincing. Section 309(a) establishes the general effective date for judicial review amendments as April 1, 1997, "except as provided in . . . section . . . 306(c)." Plaintiffs' reading would leave the exception in Section 309 (a) without a referent. In other words, if § 306(c) doesn't create an exception to § 309(a), why does § 309(a) say "except as provided in . . . section . . . 306(c)"? Plaintiffs reply that the "exception" in Section 309(a) for section 306(c) does not establish a different "effective date," but merely ensures that § 309(a) will not be read to preclude retroactive application of subsection (g) once it becomes effective, on April 1.

Plaintiffs' reply, however, has not assuaged the Court's doubts. Their "clarification" still strips the "exception" in Section 309(a) of meaning. If Section 306(c) indicates that subsection (g) has retroactive effect, then it does not create an "exception" to the start dates in Section 309(a). The retroactive effect of a statute, as Plaintiffs themselves claim, concerns the scope of a statute not its effective date. In other

words, the statute tells the reader "to go look in Section 306(c) for an exception to the start dates in Section 309(a)." According to Plaintiffs, however, when we get to Section 309(a), instead we encounter a command that Section 306(c) have retroactive effect when it goes into effect on the start dates established in Section 309(a), but, as we know, Section 309(a) tells us to go to Section 306(c). The statute places the reader in a textual loop.

The courts have created a presumption that statutes go into effect immediately unless Congress expressly provides otherwise. Here the Court does not find an express provision of Congressional intent. Instead, the Court encounters horrid ambiguity. Absent the presumption of immediate effect, this Court would perhaps adopt Plaintiffs' reading as the lesser of interpretive evils. However, with the presumption in effect as a background principle of statutory interpretation, this Court finds, in light of the statute's inherent ambiguity, subsection (g) went into effect immediately on September 30, 1996.

B. Presumption that Door Closing Statutes Do Not Bar Review of Constitutional Claims.

The extent to which Congress can regulate the jurisdiction of the federal courts is one of the great unresolved issues of constitutional law. While it cannot be doubted that Congress has the power to shape the jurisdiction of the federal courts, it is unclear whether Congress could shut the door on federal court review of constitutional challenges to government action. *See, generally*, Richard H. Fallon, Daniel J. Metlzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System*, Chapter IV (4th ed. 1996). The Supreme Court has

avoided ruling on the limits of Congressional power over the jurisdiction of the federal courts by interpreting jurisdictional statutes to allow federal court review of constitutional claims. As Judge Posner recently summarized the law, "The circuits are in agreement: door closing statutes do not, unless Congress expressly provides close the door to constitutional claims." *Czerkies v. United States Dep't of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) (en banc).[1]

In *Johnson v. Robinson*, 415 U.S. 361 (1974), for example, the Supreme Court interpreted a statute that appeared to bar all judicial review of veterans benefits determinations to permit judicial review of constitutional challenges arising from benefits claims.[2] The *Johnson* Court held that in the absence of "clear and convincing evidence" that Congress spe-

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[1] In *Czerkies*, the statute at issue, the Federal Employees Compensation Act, provides that "[t]he action of the Secretary [of Labor] or his designee in allowing or denying a payment under this [Act] is-(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b). The Seventh Circuit, en banc, found that the statute's bar on judicial review did not extend to constitutional claims.

[2] Title 38 U.S.C. § 211(a) provides:

> (a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under Chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any other court of the United States shall have the power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

cifically intended to preclude review of constitutional claims, it would not interpret a statute broadly barring all judicial review to have that effect. 415 U.S. at 373-74.

Similarly, in *Webster v. Doe*, 108 S. Ct. 2047 (1988), the Supreme Court held that while the National Security Act of 1947 precluded judicial review of statutory challenges to CIA employment decisions, constitutional challenges to such decisions were subject to judicial review.[3] It did so notwithstanding the fact that the Act drew no distinction between statutory and constitutional claims. The Court held that:

> We emphasized in *Johnson v. Robinson*, that *where Congress intends to preclude judicial review of constitutional claims its intent to do so much be clear.* In *Weinberger v. Salfi*, we reaffirmed that view. *We require this heightened showing in part to avoid "the serious constitutional question" that would arise if a federal*

[3] In *Webster*, the Respondent alleged that CIA Director's decision to terminate his employment violated the Administrative Procedure Act (APA), 5 U.S.C. § 706, because it was arbitrary and capricious. He also alleged that the decision to terminate his employment deprived him of several constitutional rights. Section 706 of the APA provides that review of agency action is not available when "agency action is committed to agency discretion by law." Section 102(c) of the National Security Act of 1947, 61 Stat. 498, as amended, provides that:

> [T]he Director of the Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ."

> *statute were construed to deny any judicial forum for a colorable constitutional claim.*

108 S. Ct. At 2053 (citations omitted) (emphasis added).

Kenneth Culp Davis and Richard J. Pierce sum up the meaning of this line of cases in their authoritative treatise on administrative law. They write,

> Taken as a whole, the Court's decisions in this area seem to send a message to Congress: "We do not seek a constitutional confrontation on the question of the power of the power of the courts to resolve disputes concerning the constitutionality of your actions or of the actions you have authorized agencies to take. We will interpret your enactments in a manner that avoids such a confrontation if we possibly can. If you desire a formal resolution of the question of your ability to preclude us from deciding disputes concerning constitutional rights, you must use statutory language that unequivocally requires us to resolve that question, e.g., actions taken pursuant to this statute are not subject to any form of judicial review, including review of the constitutional validity of such actions."

Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative law Treatise*, § 17.9 (1994).

Like the statutes reviewed in *Johnson* and *Webster*, subsection (g) does not specifically deny jurisdiction over constitutional claims. Nowhere in the text or in

the legislative history[4] does Congress express a clear intent to preclude judicial review of constitutional challenges to a decision to commence deportation hearings. Thus, the Court reads subsection (g) as preserving judicial review over constitutional claims.

The government replies to this analysis with the argument that Section 242(g) only effects the timing of judicial review. In other words, Section 242(g) does not close the door to judicial review of deportation proceedings. It merely postpones judicial review until the end of the administrative process, at which point an alien can appeal an adverse finding to a circuit court. Specifically, subsection (b)(9) provides that "judicial review' of all questions arising from "any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order section." Thus, one could argue, IIRIRA does not bar all judicial review of Plaintiffs' selective prosecution claims, but merely defers review until Plaintiffs appeal to a court of appeals from a final order of deportation. Under this reading, Section 242(g) would encompass constitutional claims because a "heightened showing" of congressional intent to reach constitutional claims is required only when a statute bars all judicial review of constitutional claims.

In support of this proposition the government cites *Thunder Basin Coal Co, v. Reich*, 114 S. Ct. 771, 779-81 (1994). In that case the Court held that a door-closing statute in the mine-safety act blocked a non-

[4] The Joint House-Senate Committee Report on IIRIRA is silent on the issue of whether Section 242(g) reaches constitutional claims. H.R. Conf. Rep. 104-828.

monetary due process claim. The agency that reviewed the mine operators' claims was independent of the agency that regulated the mines. This independent agency had addressed constitutional claims previously and its decisions were reviewable by a federal court of appeals. Since the statute allowed judicial review of final agency determinations, the Court found that the statutory scheme in issue did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Id.* at 780, n. 20.

Plaintiffs argue that Judicial review of final deportation orders under Subsection b(9), however, does not provide an adequate remedy for the constitutional claims raised in this case for three reasons. First, Subsection b(9) does not go into effect until April 1, 1997. Second, the First Amendment claims of Plaintiffs cannot be adequately addressed through judicial review of the final administrative adjudication of their cases. Third, proper appellate review is impossible because the statutory scheme does not allow for the creation of a factual record which could serve as a basis for resolving Plaintiffs' selective prosecution claims.

Subsection (b)(9) does not apply to Plaintiffs. It does not go into effect until April 1, 1997. As discussed above, § 309(a) provides that unless otherwise specified, all of the judicial review amendments take effect on April 1, 1997. Accordingly, Plaintiffs argue that subsection (b)(9) is not effective today, and cannot be relied upon to provide judicial review for Plaintiffs' constitutional claims.

Plaintiffs' argument is unrealistic. If this Court did dismiss Plaintiffs' claims and allowed the administrative deportation proceedings to continue, it would take many months for a final resolution of their cases. Certainly, subsection (b)(9) would be available long before a final order of deportation came down for any of the Plaintiffs.

Plaintiffs second argument, however, is decisive. In this case, Plaintiffs have alleged that the government initiated deportation proceedings against them in retaliation for their exercise of their First Amendment rights. This Court and the Ninth Circuit have already found that the injury to speech and association rights that stems from being targeted for a deportation proceeding is irreparable, and justifies immediate injunction relief. The Ninth Circuit held that:

> The legal and practical value of the First Amendment right may be destroyed if not vindicated before trial. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Courts thus grant extraordinary relief because "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection" so that "the duration of a trial is an intolerably long period during which to permit the continuing impairment of First Amendment rights." Even in the context of state criminal prosecutions, where federalism concerns raise additional barriers to the federal courts' exercise of equitable jurisdiction, federal courts refuse to abstain in cases

> involving a bad faith prosecution that has little expectation of a valid conviction or is initiated to retaliate for or discourage the exercise of constitutional rights. We find that the perpetual threat of deportation based on group affiliation constitutes the kind of irreparable injury that is relevant to the ripeness inquiry here.

American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1058 (9th Cir. 1996) (hereinafter "*AAADC v. Reno*") (citations omitted).

The Ninth Circuit upheld this Court's preliminary injunction in favor of six of the Plaintiffs based on its conclusion that

> The aliens have provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws. The aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights.

Id. at 1066.

Even if a court of appeals could ultimately hear Plaintiffs' claim, Plaintiffs would be required to undergo an extended deportation hearing and administrative appeal before obtaining judicial review. In the interim, Plaintiffs would suffer irreparable injury to constitutional rights, without access to a judicial remedy. Thus, Section 242(g) does more than affect the timing of judicial review. Under the Ninth Circuit's holding, post-deprivation review of Plaintiffs' constitutional claims is inherently inadequate. The

immediate harm suffered by Plaintiffs is addressed either now or never. If Section 242(g) reached Plaintiffs claims, then it would shut the door on adequate judicial review of their constitutional claims. If Congress intended to close the door on Constitutional claims, then, as discussed above, Congress must make its intent clear.[5]

Finally, Plaintiffs argue, that even if in theory post-deprivation judicial review was sufficient, the statutory scheme created by Congress in the IIRIRA does not provide an adequate record for judicial review. Under current law, immigration judges have no authority to adjudicate selective prosecution cases. *AAADC v. Reno*, 70 F.3d at 1055-56. Neither Congress nor the INS has altered the authority of immigration judges. If the immigration judge cannot develop the facts underlying a selective prosecution claim, then the court of appeals on review cannot decide the claim. *Id.* Appellate review is limited to "The administrative record on which the order of removal is based." INA, § 242(b)(4)(A), as amended. Without a factual record, the Ninth Circuit would have no basis for resolving Plaintiffs' selective prosecution claims.

Plaintiffs demolish this line of argument in their papers. They point out that the government does not dispute that under IIRIRA, appellate review is lim-

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[5] Tellingly, the government never cites *AAADC v. Reno* in any of its briefs. Instead, without actually declaring its intentions, the government makes a weak stab at relitigating the issue of whether or not Plaintiffs' claims warrant immediate judicial review. This issue, however, has now been decisively settled through the decisions of this Court and the Ninth Circuit and is, in effect, res judicata.

ited to the administrative record. Nor does the government dispute that immigration judges and the BIA lack authority to consider selective prosecution claims in adjudicating deportation cases. Instead, they suggest that this problem can be averted by Plaintiffs "proffering whatever claims or evidence they want to the immigration courts," and then raising the selective prosecution claim for the first time in the court of appeals. They also suggest that the court of appeals could remand to a district court to develop facts under 28 U.S.C. § 2347(b), if the court deemed that necessary to resolve the selective enforcement claims.

The Court agrees with Plaintiffs that if the availability of "proffer" before the immigration judge were sufficient to provide adequate appellate review, the Ninth Circuit's decision in *AAADC v. Reno* affirming this Court's jurisdiction would have come out the other way; a "proffer" to the immigration judge was just as theoretically available then as now.

Moreover, as Plaintiffs point out, a mere "proffer" is not sufficient to develop facts necessary for appellate review of constitutional claims like the selective prosecution claim here. Plaintiffs claim requires extensive discovery, and as the central issues of motive and selection will likely be disputed, will require an evidentiary hearing, including the taking of testimony and assessments of credibility. Since the immigration judge has no authority to hear a selective prosecution claim, the immigration judge would have no warrant to authorize discovery on this issue, or hear evidence and make factual findings. The court of appeals certainly cannot order discovery, hear testimony, assess credibility of witness, or make factual

findings. Thus, a "proffer" could not possibly provide the factual development necessary for resolution of Plaintiffs selective prosecution claim.

Defendants suggest that a remand to district court under 28 U.S.C. § 2347(b) might be appropriate. But nothing in IIRIRA changes the Ninth Circuit's holding that § 2347(b) "does not apply in the immigration context." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d at 1057. Indeed, the IIRIRA confirms that holding, by expressly limiting appellate court review to "the administrative record on which the order of removal is based." INA, § 242(b)(4)(B). A remand to the district court for factual findings would directly conflict with the statute, because any facts developed would by definition be beyond the administrative record. Thus, the appellate review the IIRIRA provides is clearly inadequate.

III. CONCLUSION

Plaintiffs' First Amendment injuries are immediate and cannot be addressed through post-deprivation review. Congress can bar the door to these claims, and bring on a serious constitutional confrontation, only if it acts with clear purpose. No such purpose has been displayed here, and thus, this Court finds that Section 242(g) does not reach the constitutional

claims at issue in this case. This Court DENIES the Government's Motion to Dismiss.

IT IS SO ORDERED.

DATED: 2/5/97

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-2107 SVW (KX)

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL., PLAINTIFFS

v.

JANET RENO, ETC., ET AL., DEFENDANTS

[Filed Apr. 29, 1996]

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AS TO HAMIDE AND SHEHADEH AND DENYING DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION AS TO THE SIX

After the Ninth Circuit reversed this Court's holding, that it lacked jurisdiction to enter a preliminary injunction as to plaintiffs Hamide and Shehadeh ("the Two"), *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995) ("*AAADC*"), the Two filed a renewed motion for a preliminary injunction. Shortly thereafter, the government filed a motion to dissolve the preliminary injunction that is currently in force as to plaintiffs Mungai, Amer, Barakat, Sharif, Ayman Obeid, and Amjad Obeid ("the Six"). The two motions were

briefed together and were heard on April 8, 1996. For the reasons that follow, the Court grants plaintiffs' motion and denies the government's motion.

I. BACKGROUND

Plaintiffs' motion should be granted if the Two establish a prima facie case (or colorable showing) that the filing of the McCarran-Walter ideological deportation charges against them in April 1987 (or the addition in 1991 of new ideological charges under the Immigration Act of 1990) constituted selective enforcement in that (1) the motivation for the charges was the Two's constitutionally protected association with the PFLP; and (2) similarly situated others were not charged. *See AAADC*, 70 F.3d at 1062.

The government's motion should be granted if it shows that changed circumstances (from the time the preliminary injunction was entered) render the Six unlikely to prevail on their claims that the filing of non-ideological deportation charges against them in January 1987 constituted selective enforcement. *See, e.g., Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993) ("Modification of an injunction is proper only when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable") (citation omitted); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963).

A The Government's Change in Strategy

Until now, the government's position has been that plaintiffs, as aliens, did not have the same First Amendment associational rights as citizens, and thus that plaintiffs' association with the PFLP rendered

them deportable even though (as CIA Director William Webster admitted, *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987) ("Webster Testimony")) citizens could not be arrested for the same conduct. This Court and then the Ninth Circuit both rejected this argument, and held that plaintiffs enjoyed the same First Amendment rights as citizens. *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989); *AAADC, supra.* Thus, if citizens could not have been arrested consistent with the First Amendment for the conduct engaged in by plaintiffs, then neither could plaintiffs.

Having lost its legal argument, the government now argues the facts. As the Ninth Circuit noted, 70 F.3d at 1063, the government never presented any evidence about what conduct plaintiffs had engaged in; now it must. In essence, the government now has no choice but to argue, in spite of Webster's testimony to the contrary, that plaintiffs in fact did engage in conduct that would have subjected citizens to arrest.

II. DISCUSSION

A. Healy is the Applicable First Amendment Standard

In its recent opinion, the Ninth Circuit set forth the standard the government must meet in order to prove that plaintiffs engaged in unprotected conduct: "knowing affiliation" with an organization that engaged in some unlawful activities and the "specific intent to further those illegal aims." 70 F.3d at 1063 (*quoting Healy v. James*, 408 U.S. 169, 186, 92 S. Ct. 2338, 2348 (1972)). This standard appears to be the

equivalent (in the association context) of the *Brandenburg* standard, which limits the punishment of advocacy to where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829 (1969). *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 n.56, 102 S. Ct. 3409, 3429 n.56 (1982).[1]

1. The PFLP Does Engage in Lawful Activities

Underlying the application of this standard is the determination that while the PFLP engages in unlawful activities, it also engages in lawful activities. Therefore, association *simpliciter* with the PFLP is protected by the First Amendment. This Court has held explicitly that:

> The PFLP is not solely a criminal organization. It does more than conduct terrorist operations. Thus, support of the PFLP or association with the PFLP would not be a permissible basis for the government to use in determining whom to prosecute.

Jan 11, 1994 Order Re: Discovery on Sel. Pros. at 7.

The government's own evidence submitted on the instant motions shows that the PFLP engages in lawful activities. Among many other examples of

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[1] At the April 8, 1996 hearing, the Court questioned the parties with respect to the relationship between the standards enunciated in *Healy* and *Brandenburg*. David Cole, plaintiffs' counsel, stated that there was no authority on the question whether a person may be punished for specifically intending to further future, non-imminent, unlawful activity, or in other words, whether *Brandenburg* offers broader protection to advocacy than *Healy* extends to association. *See* Apr. 8, 1996 Tr. at 65-66.

such evidence, the Palestine Youth Organization, which the government claims is a front for the PFLP, sponsors sports, games, cultural events, and political demonstrations. Markardt Dec., Exh. 11A, p. 1027-32; 11B, p. 1036-48. The government has also submitted papers seized from Evelyn Zakhary which show that the PFLP distributes literature, sponsors educational, cultural, recreational, and political events. *Id.*, Exh. E, p. 252-78. In addition, evidence submitted years ago in this action showed that the PFLP devotes significant resources to lawful activities, such as providing social services like education, day care, health care, and social security, as well as cultural activities, publications, and political organizing. *See* Pl. Reply at 19.

Nowhere in the government's papers does it state that it is seeking reconsideration of this Court's express holding that the PFLP engages in lawful activities. But the vast majority of the government's submission is intelligible only in the context of such an argument, for its relates only to the PFLP generally, rather than to plaintiffs as individuals. The government has submitted book-length tracts published by the PFLP explaining its interpretation of Marxist-Leninist ideology. It has submitted dozens of issues of *Al-Hadaf*, the PFLP's official newspaper, none of which mention any of the plaintiffs. It has also submitted extensive hearsay compilations of the acts of terrorism linked to the PFLP over the years, in none of which any of the plaintiffs are in any way implicated.

2. The Government's Inappropriate Attempt to Relitigate the First Amendment Issue

In other words, the government has devoted most of its efforts to painting the PFLP as a terrorist organization, rather than painting plaintiffs as terrorists. But, put simply, the nefarious nature of the PFLP is irrelevant under the *Healy* specific intent standard. The government's confusion (or worse) is exemplified by the fact that its opening brief did not even mention the *Healy* standard, even though barely three months had passed since the Ninth Circuit had expressly held that it governed this case.

Instead, the government attempts to relitigate the question of the applicable First Amendment standard. It devotes much of its opening brief to arguing for the application of a deferential "immigration context" standard based on *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977), cases which this Court and the Ninth Circuit distinguished as involving exclusion rather than deportation. *See* 714 F. Supp. at 1075-77; 70 F.3d at 1064-65. The government contends that since the Ninth Circuit's holding was made in the context of an appeal of a preliminary injunction rather than a final judgment, it is not the law of the case. Whatever the merit of this contention, it ignores the seemingly obvious fact that this Court is bound to follow every decision of the Ninth Circuit. The government's law of the case argument is an irrelevant distraction.

In summary, then, in order to defeat plaintiffs' motion as to the Two and to prevail on its own motion, the government must show that plaintiffs had the specific intent to further the PFLP's unlawful aims. If plaintiffs had such specific intent, the government's discriminatory selection of them for deportation would be based on a permissible reason, rather than the impermissible reason of their association with the

PFLP.[2] Since plaintiffs cannot prevail on the discriminatory motive prong of their selective enforcement claims unless the basis for the discrimination is impermissible, plaintiffs would thus be unlikely to prevail on such claims. If the government does not make such a showing, the Court should (1) reaffirm its preliminary conclusion as to the Six that the government's basis for selecting them was their First Amendment-protected association with the PFLP, and thus deny the government's motion; and (2) make the same preliminary conclusion as to the Two (for the same reasons as the Court relied upon for the Six), and thus grant plaintiffs' motion.[3]

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[2] Technically, plaintiffs bear the burden of persuasion on their claim for a preliminary injunction. However, the Two rely on the same evidence regarding discriminatory intent and disparate impact as the Court found justified a preliminary injunction as to the Six. The Court therefore finds that, like the Six, the Two are likely to prevail on their selective enforcement claims unless the government can show that its selection of them was based on a permissible reason. Thus, the issues for the two instant motions converge.

[3] The government makes one additional argument as to why plaintiffs are unlikely to prevail. It contends that the decision to deport plaintiffs was made by Elizabeth Hacker, INS District Counsel in Los Angeles, and that no other INS offices or other federal agencies were involved in the decision. If this were true, it would mean that the control group would have to be limited to the Los Angeles INS office, and the government says that there is no evidence that similarly situated others were not deported by that office. Plaintiffs would thus be unlikely to prevail on the disparate impact prong of their selective enforcement claims.

The Court rejects this argument. Abundant evidence shows that higher-up national and regional INS officials, as well as representatives of the FBI, were involved in the decisionmaking process. The two memoranda the Court recently held not

B. The Government's Showing

The government faces several obstacles in its attempt to make the required showing. First, plaintiffs make a strong argument that the Court should refuse even to consider some 8500 pages of the government's approximately 10,000-page submission, at least as to the Six. Second, even if the Court were to consider the whole submission, most of it is irrelevant because it relates only to the PFLP, rather than to the decision to deport plaintiffs, and much of the submission is otherwise inadmissible. Finally, and most funda-

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privileged are two of many examples of such evidence. *See* Order to Compel, March 6, 1996. Neither of the two memos was written to or by anyone in the Los Angeles INS office, and one reveals the involvement of the INS commissioner himself. While it may be technically true that an official from the Los Angeles office signed off on the orders to show cause, it is disingenuous to suggest that this means the decision to deport plaintiffs was made exclusively in the Los Angeles office.

United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995), on which the government relies, is not to the contrary. In that case, the Ninth Circuit held that circuit-wide discovery was improper in a criminal case where the defendant had been charged pursuant to guidelines developed solely by the local United States Attorney's Office, "without consultation with any other USAO or with Department of Justice officials in Washington, D.C." *Id.* at 305. While in *Gomez-Lopez* there was "no evidence indicating that there is communication or coordination among the USAOs within the circuit that *could* have affected the decision to prosecute," *id* at 307 (emphasis in original), in the instant case there is plentiful evidence of high-level, national coordination between INS, FBI, and DOJ officials that demonstrates quite clearly that "the decision to prosecute" plaintiffs was "affected" by events far beyond the confines of the INS Los Angeles office. The "scope of the discovery" ordered by this Court thus "bear[s] a reasonable relationship to the decision" to deport plaintiffs. *Id.* at 306.

mentally, what "evidence" the government does have regarding plaintiffs does not show that any of the plaintiffs had the specific intent to further the PFLP's unlawful activities.

1. Should the Court Consider the Newly Submitted Evidence?

The government has submitted approximately 10,000 pages of documents on the instant motions. The government produced approximately 1500 pages of documents in discovery, most of which it included in its 10,000-page submission. Plaintiffs argue that the remaining 8500 pages should not be considered.

At the hearing held on August 16, 1995 on the motion to compel filed by the Six, one issue was plaintiffs' request for production of documents reflecting upon the INS's decision to file the deportation charges that were in the possession of the FBI or DOJ rather than the INS itself. The government had produced approximately 1500 pages of documents in discovery up to that point.[4] Plaintiffs thought other documents existed that might be relevant to the question of the government's motivation in deciding to deport plaintiffs, and they thought that some of these might be in the possession of the FBI or DOJ. Plaintiffs therefore asked that the INS be required to

[4] Defendants produced the following: a four-volume FBI report by SA Frank Knight, attached to Knight's Declaration as Exh. 45; a videotape of the St. Nicholas dinner, attached as Exh. 16A to Knight's Declaration; plaintiffs' immigration files (which plaintiffs say appear to be irrelevant to the instant motions and which the government did not include in its 10,000 page submission); various FBI and INS memos regarding the investigation of plaintiffs. *See* Pl. Appendix of Materials Produced by Def. (March 20, 1996).

produce all relevant documents, not just those in its possession.

At the August 16 hearing, the government's attorney, Michael Lindemann, said: "We have produced all of the materials that INS had at hand when it made that decision. Things that the INS never saw could have no bearing on the INS's decision to prosecute." Tr. at 7. The Court was not immediately satisfied, and pressed the government on the question of discussions between INS and other agencies. "Are you telling me that there are no documents in the possession of the FBI or Justice Department which reflect upon the decision to deport these people?" Lindemann answered, "Your Honor, you have them all." The Court asked again, "So you're saying there are no others?" Lindemann replied, "To our knowledge, there are no others, Your Honor." Tr. at 8.

Thus, at the August hearing, the government insisted, upon repeated questioning, that the 1500 or so pages of documents which it had already produced were all of the documents that reflected upon the INS's decision to file deportation charges against the Six. The government insisted that any other materials "could have no bearing on the INS' decision to prosecute." Now, the government is attempting to introduce some 8500 additional pages of documents which, by its own admission, played no role in the decision to file deportation charges against the Six. The central question before the Court on the instant motions is whether there is prima facie evidence that the INS made that decision for an impermissible reason. This is the exact same question that the discovery at issue at the August hearing was intended to illuminate. Documents of which the INS was unaware at the time it made that decision cannot

possibly be relevant to the question of its motivation in making the decision.[5]

Therefore, the government would seem to be caught in a catch-22: either (1) the government was telling the truth at the August 16, 1995 hearing, and all of the 8500 pages of newly-submitted documents are irrelevant to the question of the INS's motivation in making the decision to deport the Six; or (2) the government was not telling the truth at the August 16 hearing, and some or all of the new 8500 pages might be relevant as to the Six.

In its papers, the government responds, albeit indirectly, by saying it "previously declined to submit this factual record because a variety of jurisdictional and other precedents convinced them that these aliens' claims in this Court should have been dismissed as a matter of law. Having failed to persuade this Court and the Ninth Circuit Court of Appeals on that point, defendants now comply with the Ninth Circuit's opinion in *AAADC v. Reno*, and, consistent with this Court's Amended Order of January 1994, address these aliens' claims of selective prosecution

[5] At the April 8, 1996 hearing, the government noted that the document requests at issue at the August 16, 1995 hearing related only to the Six, not to the Two, and that there is thus no inconsistency between the government's 1500-page discovery production and its 10,000-page submission on the instant motions as to the Two. But the flipside of this would be that the 8500 new pages relate only to the Two. However, at the April 8 hearing, when asked whether it was conceding that the 8500 new pages are irrelevant as to the Six, the government demurred. In light of that, and of the fact that the 10,000-page submission is not differentiated according to whether it relates to the Two or to the Six or to all plaintiffs, the Court finds the government's explanation less than completely persuasive.

using a complete factual record." Def. Opp. at 3. In its reply, the government repeats this argument, contending that "[t]he new factual picture presented by the government's submission is the 'changed circumstances,' which, along with the effect these facts have on the applicable legal analysis, satisfy the legal requirements for dissolving the preliminary injunction granted earlier and for denying the additional injunction now sought by plaintiffs." Def. Reply at 9.[6]

[6] It should be noted that this argument does not justify the government's filing of the instant motion to dissolve. "Changed circumstances" refers to matters outside a party's control, not changes in the party's litigation strategy. The latter is an improper reason to bring a motion to dissolve or modify an injunction. *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S. Ct. 460, 464 (1932) ("The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making"). "A motion to modify a preliminary injunction is meant only to relieve inequities that arise after the original order." *Favia*, 7 F.3d at 338. *See also Building and Constr. Trades Council v. NLRB*, 64 F.3d 880 (3d Cir. 1995). The substance of the government's new 10,000-page submission was available to the government at the time the preliminary injunction was entered; the government simply chose not to litigate the facts at that time. There have been no "(1) changes in operative facts, (2) changes in the relevant decisional law, [or] (3) changes in any applicable statutory law." 11A Wright, Miller & Kane, Fed. Prac. & Proc.: Civil 2d § 2961, at 402-03. The Court could thus deny the government's motion on the ground that it is "merely an untimely Rule 59(e) motion for reconsideration disguised as a motion to modify." *Id.* at 337. *Accord Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363, 365 (9th Cir. 1990) (party seeking modification of injunction must "show clearly a substantial change in circumstances or law since the orders were entered [and] extreme and unexpected hardship in compliance with the injunction's terms"); *Merrell-Nat'l Lab., Inc. v. Zenith Lab., Inc.*, 579 F.2d 786, 791-92 (3d Cir. 1978).

Like the government's argument that the Ninth Circuit's holding that *Healy* applies is not the law of the case, this argument is an irrelevant distraction. If the government thought it could successfully oppose plaintiffs' motion for a preliminary injunction on purely legal grounds, it was certainly entitled to rely on those grounds. But once the government lost on that motion, and the Court ordered it to produce to the Six all documents reflecting upon the decision to file the deportation charges, "purely legal" arguments about the applicable First Amendment standard had nothing to do with anything.

The government's implication in the above-quoted statement that it submitted this "complete factual record" because the Ninth Circuit ordered it to is also misleading. Nothing in *AAADC v. Reno* directed the government to submit documents which it had represented to this Court were irrelevant. Based on the discussion in the papers and the statements of Michael Lindemann at the April 8 hearing, the Court concludes that what the government means, but for obvious reasons is reluctant to say outright, is that the Ninth Circuit's rejection of its legal arguments forced it to change its litigation strategy. While this is understandable, it does not extricate the government from the catch-22 in which it currently finds itself mired.

The Court finds the government's conduct in this regard extremely troubling, but in view of the importance of the issue, the Court has considered the entire 10,000-page submission.

2. Most of the Government's Submission is Inadmissible or Irrelevant

Since the sheer volume of the submission precludes a document-by-document analysis, the Court will discuss a few of the recurring evidentiary problems plaguing the government's submission. The government states that it "submitted approximately 10,000 pages of factual material, substantial portions of which were at one time classified," Def. Reply at 1, but it continues to rely on unattributed hearsay from confidential sources. Much of what Knight and Markardt say in their declarations is based on information allegedly obtained from unidentified sources. *See* Pl. Reply at 14 & nn.19-20. Even if the sources were identified by name, Knight's and Markdardt's accounts of what the sources told them would be inadmissible as hearsay. Where the sources are not identified, as plaintiffs point out, reliance on this "evidence" poses the same due process problems as prohibit the INS from relying on undisclosed classified information in a legalization proceeding. *See AAADC*, 70 F.3d at 1067-70.

The government's translations are extremely problematic. Most of the documents submitted, as well as the speeches recorded on the tapes of the fundraising dinners, are in Arabic. The government has not submitted a single declaration from any of its translators (often it does not even identify the translator), so there is no foundation for any of the translations. *See* Fed. R. Evid. 604. In addition, plaintiffs say that the government has not submitted the original Arabic materials for some of the translations it has submitted. This does not affect the Court's ability to evaluate the evidence, but plaintiffs ought to be able to

see the original Arabic documents in order to check the accuracy of the translations. *See* Pl. Reply at 16 & n.22.

Moreover, many of the government's translations are undated, so it is unclear whether they could have been made available to the INS in 1987 when it made the decision to deport plaintiffs. *See, e.g.*, Knight Exh. 30B. The government bears the burden of establishing the relevancy of its proffered evidence, so the Court should not admit any of the undated translations. Many of the translations that are dated were not prepared until 1990 or 1991, well after the decision to deport plaintiffs was made, so these translations could not have affected that decision and are thus clearly irrelevant. *See, e.g.*, Knight Exh. 26B.

Similarly, the transcript of the immigration proceedings involving plaintiffs (which consumes more than half of the 10,000-page submission) is irrelevant because it did not exist at the time the decision to deport plaintiffs was made and thus could not have been relied upon by the INS. The same is true of the declarations of Burleigh, Wilcox, and Bremer, government counter-terrorism officials who prepared declarations describing the history of the PFLP.[7]

[7] At the April 8 hearing, the government conceded that the immigration transcript is irrelevant because it was not provided to the INS at the time it made the decision to deport plaintiffs. Apr. 8, 1996 Tr. at 23. The counter-terrorism officials' declarations are irrelevant for the additional reason that they relate only to the PFLP generally, rather than plaintiffs as individuals. Similarly, the Markardt declaration is irrelevant because it relates only to activities of the PLFP in New York, and has nothing to do with any of the plaintiffs.

The government offered no response whatever either in its papers or at the April 8, 1996 hearing to plaintiffs' arguments regarding the translations.

The government's only response to plaintiffs' hearsay charges is that since the Federal Rules of Evidence do not apply in a deportation proceeding, and hearsay is admissible in a deportation proceeding if it is probative and its use is not fundamentally unfair, the government should be able to rely on hearsay in this action to prove that it acted properly in instituting deportation proceedings against plaintiffs. The use of what would otherwise be hearsay information regarding the activities of plaintiffs would be permissible under Fed. R. Evid. 801(c) if such information were offered to establish the state of mind of the decisionmakers rather than the truth of the matter asserted, *i.e.*, that plaintiffs in fact did what is alleged. But the government does not assert that the information it seeks to introduce is offered for this purpose. It merely argues that because this case involves a deportation proceeding and hearsay is admissible in a deportation proceeding, that hearsay should be admissible here. Def. Reply at 9.

At the April 8 hearing, the government analogized the question whether the decision to deport plaintiffs violated their First Amendment rights to a determination whether probable cause existed for an arrest. In the latter context, because probable cause may be based on hearsay, hearsay is admissible to show the existence of probable cause. The Court need not resolve this issue, because as explained below, the proffered evidence does not show that any of the plaintiffs had the specific intent to further the unlawful aims of the PFLP.

3. The Government's Submission Does Not Show that Plaintiffs Had the Specific Intent to Further the PFLP's Unlawful Aims

Even if the Court gives the government the benefit of the doubt as to the discrepancy between its 1500-page document production and its 10,000-page submission (despite the weakness of the government's explanation), and even if the Court disregards the grave evidentiary problems afflicting much of the government's submission, the government faces a more fundamental problem: its submission does not show that any of the plaintiffs had the specific intent to further the illegal aims of the PFLP.

The government's case is based on information gathered from the surveillance of plaintiffs (principally Hamide), in particular as regards three fundraising dinners held in the Los Angeles area in 1985 and 1986. Nearly all of the rest of the government's submission relates only to the PFLP, not to plaintiffs. The first of the three dinners was held at St. Nicholas Cathedral in Los Angeles in February 1985. The second was held at the VFW Hall in San Bernardino in June 1985. The third was held at the Glendale Civic Auditorium in February 1986.

The government sums up what it apparently considers to be its strongest evidence at pages 30-31 of its opening brief: plaintiffs "(1) distributed Al Hadaf on a commercial scale, collected subscriptions, presumably reimbursed the PFLP in Damascus for the cost of those subscriptions, and transported these shipments from the airport cargo facilities to Hamide's residence; (2) rented facilities for fundraising events; (3) arranged and provided security for PFLP events; (4) decorated, organized, catered, conducted, and cleaned

up after such events; (5) held leadership positions in the organization; (5) [sic] [6] furnished transportation to other PFLP leaders; (6) [sic] [7] attended high level PFLP meetings abroad (7) [sic] [8] ordered and arranged the attendance of other members at PFLP meetings abroad; and (8) [sic] [9] engaged in regular communications with other PFLP leaders in the United States." Def. Opp. at 30-31.

Notwithstanding the government's characterization of this conduct as "the concerted acts of an international terrorist conspiracy," *id.* at 31, none of the nine items constitutes evidence of any plaintiff's "specific intent to further the unlawful aims" of the PFLP.

a. *The Glendale Dinner*

The closest the government comes to the required evidence is in its recounting of the 1986 Glendale dinner. During the fundraising portion of that dinner, Hamide (who was acting as the MC) said: "Here the collection of contributions is mainly for the nation, for the combatants in Lebanon and on the West Bank." Knight Decl. at 47; Exh. 30B at 6. Hamide also said: "The oversight committee will take over now and will announce the total [unclear] and will see to that. They will supervise the sending of the donation to the homeland. I think that on the tables there is also information about last year's donations, that it was received in the homeland and this was confirmed by Al Hadaf magazine." Knight Decl. at 48; Exh. 30B at 6. Finally, after an interlude of dancing and singing, Hamide said: "People, the revolution will not continue and the march to Palestine will not go with words alone. The revolution requires support. Those who cannot offer their lives, as do those who sacrifice

their lives daily, can at least offer support here to the heroes, the heroes who teach the enemy lesson after lesson." Knight Exh. 30B at 8. During this time, Ayman Obeid and Sharif walked around the room collecting checks from attendees and passing them up to the stage, and Shehadeh was on stage with Hamide.

Plaintiffs point out several problems with this evidence and provide additional evidence which puts the government's evidence into context. First, the above quotes are purported translations of remarks made in Arabic, which agents Knight and Gappert do not speak or understand. They taped the event, and had it translated later. But the tape was unclear at many parts during the fundraising portion, so the translation submitted is admittedly incomplete (only three minutes including inaudible parts, according to plaintiffs).[8] Plaintiffs say that one part of the event not captured on the government's tape is the fact that "the solicitations were introduced with a call for assistance to those suffering in the refugee camps in Lebanon and the West Bank," and they submit

[8] Moreover, it should be noted that it is far from clear that this translation was provided to the INS before it made the decision to deport plaintiffs. The translation is undated (as well as unsigned), and it was not included in the FBI report which was provided to the INS despite the fact that the FBI report discussed the Glendale dinner at great length. *See* Knight Dec., Exh. 45. Knight's declaration does not say anything about who made the translation, when it was made, or whether it was provided to the INS. *See id.* at 43-52. At the April 8 hearing, the government was unable to offer any evidence that the FBI presented this translation to the INS before the INS decided to deport plaintiffs. The government has thus not met its burden of establishing the relevancy of this translation.

supporting declarations from people in attendance at the event. *See* Decl. of Ibrahim, Alwan.

In addition, the government omits in its brief the fact recorded in its exhibits that in between the first two of Hamide's statements quoted above, Pierre Alwan, the president of US OMEN (an IRS-certified charitable organization that the government contends, with no evidence at all, is in reality a front for the PFLP's military operations), solicited in English contributions of furniture and other items to a thrift store run by US OMEN. Knight Exh. 30B at 6.

In the same regard, the government's own evidence shows that at the St. Nicholas event in 1985, the fundraising was expressly for the benefit of US OMEN. Hamide told attendees to make checks payable to US OMEN. Knight Delc. at ¶56. The declarations of Nasir, Ibrahim, Ajjawi, and Alwan corroborate this, and state that the donations solicited at the dinners were understood to be for humanitarian purposes only. The government has no evidence of what actually transpired at the San Bernardino VFW dinner in June 1985 (which Amer, not Hamide, ran), but it says that in advance of that dinner, the FBI received information that the fundraising to be conducted would be represented to the audience as for the benefit of "mothers and orphans of Palestinians in the Middle East." Knight Decl. at ¶83(d).

b. *The Healy "Specific Intent" Standard*

None of these statements proves that Hamide (much less any of the other seven plaintiffs) had the specific intent to further the unlawful aims of the PFLP. The reference to "combatants" is unimpressive, because as the government argues in a different context, all PFLP members are referred to as "com-

batants and supposedly bound by PFLP doctrine to be "combatants." *See* p. 26-27, *infra*. Obviously, most are not "combatants" in the sense the government is trying to pin on Hamide's statement. As plaintiffs point out, "combatants" could refer to all those who opposed or spoke out against the West Bank occupation, all those who opposed the peace process, or all those who participated in strikes in protest of the occupation. The same is true for "heroes who teach the enemy lesson after lesson."

In context, there is no reason to believe that these statements evince a specific intent to raise money for terrorism. Rather, the PFLP employed terms such as "combat" and "hero" broadly, as rhetorical flourishes, consistent with the Supreme Court's recognition that militant rhetoric goes with the territory of political speech by political minorities. *See*, *e.g.*, *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969) ("The language of the political arena . . . is often vituperative, abusive, and inexact"). Indeed, the Supreme Court has extended the protection of the First Amendment to speech far more militant than what Hamide is alleged to have said. *See id.* at 706, 89 S. Ct. at 1400 ("if they ever make me carry a rifle the first man I want to get in my sights is L.B.J."); *Noto v. United States*, 367 U.S. 290, 298, 81 S. Ct. 1517, 1521 (1961) ("certain individuals hostile to the Party would one day be shot"). The government makes much of Hamide's statement that the money being collected was destined for "the homeland," but that statement in no way shows that the money would support illegal activities in "the homeland." The money could as easily have been destined for the refugee camps mentioned above, or for any of the

numerous other lawful activities engaged in by the PFLP.[9]

The Court's conclusion is confirmed by an examination of the Supreme Court's opinion in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409 (1982), its most recent treatment of these issues. That case involved a widespread and long-lasting boycott of white-owned stores in Port Gibson, Mississippi. One of the principal ways the boycott organizers achieved broad compliance with the boycott was by stationing "store watchers" and "Black Hats" outside the white-owned businesses to record the names of blacks that patronized them. In addition to the use of the lawful sanction of social ostracism to dissuade blacks from breaking the boycott the Court expressly noted that "some members of each of these groups engaged in violence or threats of violence." *Id.* at 926, 102 S. Ct. at 3432. Relying on this unlawful activity, the plaintiffs sought to impose liability on all individuals who were either store watchers or members of the Black Hats. The Court held that while the individuals who engaged in the unlawful activities could be liable, the individuals who associated with these two groups but did not personally engage in the unlawful activities carried out by some of their number could not be liable "absent a specific intent to further an unlawful aim embraced by that group." *Id.* at 925, 102 S. Ct. at 3432.

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[9] As plaintiffs stated at the April 8 hearing, it would not demonstrate a specific intent to further any unlawful activities to prove that the funds raised would be devoted exclusively to the PFLP's military activities. This is because the PFLP engages in legal military activities, such as defending refugee camps, as well as illegal military activities.

Just as "[t]here is nothing unlawful in standing outside a store and recording names" or "in wearing black hats, although such apparel may cause apprehension in others," *id.*, there is nothing unlawful in distributing literature, recruiting new members, collecting money, or organizing dinner events, even if others find such literature or events alarming. And just as the Supreme Court in *Claiborne Hardware* refused to allow liability to attach by virtue of association with groups that engaged in unlawful activity, plaintiffs in the instant case cannot be deported for associating with an organization that engages in unlawful activity.

Because a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired,'" *id.* at 919, 102 S. Ct. at 3428 (*quoting Scales v. United States*, 367 U.S. 203, 229, 81 S. Ct. 1469, 1486 (1961)), the First Amendment requires "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" *Scales*, 367 U.S. at 229, 81 S. Ct. at 1486 (*quoting Noto*, 367 U.S. at 299, 81 S. Ct. at 1522)).

The *Claiborne Hardware* Court noted that the Court in *Noto* had "emphasized that this intent must be judged 'according to the strictest law,' for 'otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.'" *Claiborne Hardware*, 458 U.S. at 919, 102 S. Ct. at 3429 (*quoting Noto*, 367

U.S. at 299-300, 81 S. Ct. at 1521)). Here the government has simply not presented "clear proof" that any of the plaintiffs "specifically intend[ed] to accomplish [the unlawful aims of the PFLP] by resort to violence."

The government's response in this regard is, unfortunately, typical of its approach to this case: claiming the moral high ground while making misleading arguments. "The PFLP cannot remotely be compared to the NAACP. The NAACP never kidnaped and murdered an American Ambassador; it did not slaughter innocent American citizens at the Lod Airport . . . ." Def. Reply at 11. The entire point of freedom of association is that it doesn't matter whether the PFLP can be compared to the NAACP, and it doesn't matter whether the PFLP has done all these bad things and more. The point is that there is no evidence that any of the plaintiffs ever kidnaped, murdered, or slaughtered anyone, so "precision of regulation" is required to ensure they are not punished for their constitutionally protected activities. *Claiborne Hardware*, 458 U.S. at 916, 102 S. Ct. at 3427 (*quoting NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340 (1963)).

c. *The Government's Other Evidence is Unpersuasive*

As the Court has stated above, the evidence regarding the Glendale dinner is the government's strongest. For the sake of completeness, the Court will describe certain other evidence relied upon by the government as well. When one considers this additional evidence, the overall weakness of the government's showing—despite the sheer enormity of its submission—becomes apparent.

A recurring feature of the government's submission is the making of conclusory assertions without any supporting evidence. For example, Knight's narration of the Glendale dinner includes statements such as: "It is obvious that this fundraiser has nothing to do with building hospitals or schools, it is solely for raising money for terrorist activities by the PFLP." Knight Exh. 30B at 1. Knight doesn't say exactly why he thinks this, but it appears to be because "[t]here are posters with people carrying AK 47s and standing behind anti tank howitzers." *Id.* Knight also says that "[t]he males are wearing fatigue shirts and camouflage fatigue pants, this would not be a normal attire for obtaining cash for orphans, it is one to get cash for guns." *Id.* Thus, instead of following the trail of the money collected at the Glendale dinner, the government simply advances the bald assertion that because the event had a militant tone, it must have been intended to support exclusively the PFLP's terrorist activities. There is no basis in logic or in the proffered evidence for this assertion.

Indicative of the government's scattershot, guilt by association approach is its statement of facts in its opening brief, which begins with the following: "Sisters and brothers we all know the revolution wants to transform dollars into bullets, the dollar into bombs, the dollar into a loaf of bread for a family in a hungry camp .... Therefore, I suggest putting this chain on auction. This way we change this chain to dollars. From dollars then we can transform it to bullets, and the bullets to kill Zionists in the occupied land. Let us start auctioning on this chain." Def. Opp. at 3. Unfortunately for the government, this alleged statement was made by an unidentified New York PFLP

leader, not any of the plaintiffs. It is thus hardly probative of plaintiffs' specific intent.[10]

The government is much exercised about the speech given by Jaber El-Wanni at the Glendale dinner. El-Wanni allegedly (the problems with the government's translations that the Court detailed above are present here as well) threatened Arabs who supported the Amman Accord, and named some names. One of those named was Nablus Mayor Zaphir Al Masri, who was assassinated a few weeks later. The PFLP, among other groups, claimed responsibility for the killing. *See* Knight Decl. at 45-46. The government argues that this gave it the right to prosecute plaintiffs for conspiracy or making threats.

As plaintiffs explain, "[t]here is no evidence that plaintiffs directed Mr. El-Wanni to make that statement, conspired with him, nor even that they were aware that he would make it. The only theory left for holding plaintiffs responsible for Mr. El-Wanni's statement is guilt by association, a theory forbidden by the First Amendment." Pl. Resp. at 2. The fact (if it is a fact) that El-Wanni threatened Al-Masri with plaintiffs present in no way proves that plaintiffs had the specific intent to further any unlawful activities.

Perhaps the most dubious of the government's many unpersuasive arguments is its claim that "PFLP doctrine mandates that every PFLP member be a combatant and binds all members to the positions taken by PFLP leaders. PFLP doctrine also holds that all PFLP activities are subordinate to the 'battle.' Knight Decl. at 13. To the committed PFLP

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[10] Similarly, the entire Markardt declaration relates to activities of the PFLP in New York, and has nothing to do with plaintiffs.

member, pulling a trigger is no different than selling a subscription to Al Hadaf, and soliciting money for the cause is the same as killing Zionists. Every act has a political message. Every utterance carries a terrorist purpose." Def. Opp. at 4.[11] Putting aside for the moment the sheer incredibility of this claim, the real issue, as plaintiffs point out, "is not whether these things are indistinguishable 'to the committed PFLP member,' but to the United States Constitution." Pl. Reply at 26. As the Supreme Court has observed, "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Aptheker v. Sec. of State*, 378 U.S. 500, 510, 84 S. Ct. 1659, 1666 (citation omitted).

It should also be noted that most of the evidence discussed in this Order relates mainly to Hamide, to a somewhat lesser extent to Shehadeh, and only indirectly to the Six. Plaintiffs' helpful summary of the evidence with respect to each of the Six (helpful because the government nowhere particularizes its evidence among the various plaintiffs) reveals that most of it is based on their association with Hamide. *See* Pl. Reply at 32-33 n.36. Thus, the Court's conclusion that the government has not demonstrated

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[11] This presumably is the reason for the government's submission of many hundreds of pages of PFLP publications, such as "The Political and Organizational Strategy," published by the PFLP's Central Information Committee. The government quotes and underscores, as if it is somehow meaningful, the statement in this work that the "dialectical link between the battle and the political activity is a sound guide for our action" and that "[a]ll organization, political, informational, and financial efforts must be linked to the interests of the battle and not be at its expense." Def. Opp. at 4-5 n.4.

that Hamide or Shehadeh had the specific intent to further the unlawful aims of the PFLP applies a fortiori to the Six.

d. *The Government's Strict Scrutiny Argument*

The government argues that "[e]ven assuming that the conduct engaged in by these aliens is characterized as pure political 'advocacy' and the government action or regulation here is an infringement of these aliens' freedoms of association . . . the Supreme Court has declared that 'it is clear that 'neither the right to associate nor the right to participate in political activities is absolute.'" Def. Opp. at 36 (*citing Buckley v. Valeo*, 424 U.S. 1, 25 (1976). In other words, selecting plaintiffs for deportation on the basis of First Amendment protected conduct does not automatically violate the First Amendment; it is subject to strict scrutiny as a content-based regulation of speech and association. The government thus argues that its action was narrowly tailored to further a compelling governmental interest.

At the April 8, 1996 hearing, plaintiffs argued that the considerations underlying the strict scrutiny standard are already incorporated into the *Healy* standard. More specifically, the argument goes, the Supreme Court held that the compelling governmental interest in stopping groups' unlawful activities may, in light of the protection to which associational conduct is entitled under the First Amendment, be furthered only by targeting those associators who have the specific intent to further the group's unlawful activities; targeting associators who lack this specific intent would be an inefficiently narrowly tailored method of regulation. The *Healy* rule would

thus constitute a context-specific application of strict scrutiny.

The Court agrees with plaintiffs. In *Claiborne Hardware*, the Supreme Court set forth the *Healy* standard and for support, then stated that "[i]n this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" 458 U.S. at 920, 102 S. Ct. at 3429 (*quoting Carroll v. Princess Anne*, 393 U.S. 175, 183-84, 89 S. Ct. 347, 353 (1968)). This indicates that *Healy* in effect is the strict scrutiny standard in the particular context of association with groups that engage in both lawful and unlawful activities. In addition, the Court has discovered no case in which the court has analyzed the issue as the government suggests: first find that a government regulation of associational activity is unjustified under *Healy* and then apply strict scrutiny to determine whether it can nonetheless be upheld. The absence of an explicit levels-of-scrutiny analysis is not worrisome or unusual, since (as the government argues in a different context, *see* Def. Opp. at 23-25), the Supreme Court often speaks without reference to levels of scrutiny in First Amendment cases. *See e.g., City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

In any event, if strict scrutiny applies independent of the *Healy* test, the Court holds that the government's action in deporting plaintiffs for their protected association with the PFLP fails such scrutiny. The government asserts that it has a compelling interest in stopping terrorism. It surely does. But if the government cannot prove that plaintiffs had the specific intent to further any terrorist activities, it cannot demonstrate that its deportation of plaintiffs

was a narrowly tailored action in furtherance of that interest.[12]

When questioned in this regard at the April 8 hearing, Lindemann, the government's attorney, advanced the eye-opening contention that when the government has a compelling interest, it "can do pretty much what it wants to do." Apr. 8, 1996 Tr. at 67. Not only is this contention utterly without a basis in law, but it is also quite disturbing to hear coming from the government as a justification for its conduct in a case where the plaintiffs have made a preliminary showing that the government in effect treated them as if it could do whatever it wanted.

Lindemann's statement could be dismissed with the recognition that extemporaneous oral remarks tend naturally to suffer from imprecision and are not always intended to mean what they appear to say. But off-the-cuff oral remarks also often mean just what they say, even (or especially) if they weren't intended to be said. The Court is more inclined to view Lindemann's statement as an unintended but sincere product of the extemporaneous setting—a Freudian slip—given his argument to the same effect in his reply brief, in which he contended that because of the difficulty of this case, "the interests of the sovereign must weigh heavily." Def. Reply at 8. It should not need to be said that in this as in every case, "the interests of the sovereign" are entitled only to so much deference as the law affords them. A demo-

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[12] It would thus appear that the government could never pass strict scrutiny when it fails *Healy*, which is another reason to believe that strict scrutiny is embodied in the *Healy* standard and need not be separately analyzed in this case.

cratic government is constituted of, controlled by, and exists for, the people; it is their equal before the law.[13]

III. CONCLUSION

In light of all the foregoing, the Court holds that the government has failed to show that any of the plaintiffs had the specific intent to further the unlawful aims of the PFLP. This is what William Webster admitted years ago, and the government's 10,000-page submission confirms it. Therefore, plaintiffs' association with the PFLP was protected by the First Amendment. The Court has already found preliminarily that the Six have made out a prima facie case that this protected association was the government's motivation in selecting them for deportation and that others similarly situated were not so selected. The Court hereby reaffirms that finding, and denies the government's motion to dissolve the preliminary injunction as to the Six. For the same reasons as the Court found the Six had made out a prima facie case of discriminatory motive and disparate impact, the Court finds that the Two have done so as well. The Court therefore grants their renewed motion for a preliminary injunction.[14]

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[13] The Court recognizes that plaintiffs are not citizens of the United States, but as stated, under *AAADC v. Reno*, they are entitled to the same First Amendment rights as citizens.

[14] In its reply, the government argues that it need not prove beyond a reasonable doubt that plaintiffs had the specific intent to further the PFLP's unlawful aims, but only meet the "evidentiary burden" "which would justify initiating a civil deportation proceeding." Def. Reply at 1. It is probably true, as the government argues, that to institute a deportation proceeding, the government need only have a prima facie case of deportability. But that is not the issue here. Plaintiffs do not contend that they are not deportable; the government clearly had evidence that various of the plaintiffs advocated "world communism," 8 U.S.C. § 1251(a)(6)(D), or were out of status, 8 U.S.C. § 1251(a)(2). What plaintiffs contend is that the government decided to act on this evidence of deportability to deport them, while not acting on similar evidence to deport similarly situated others, because of plaintiffs' association with the PFLP. If this is true, it would constitute selective enforcement in violation of the First Amendment regardless of plaintiffs' statutory deportability. To prevail on the instant motions, the government must show that the conduct by plaintiffs that motivated it to deport them was not protected by the First Amendment. The Court has concluded that the conduct which plaintiffs have preliminarily shown to have motivated the government was protected by the First Amendment. The Court need not address the question at what level of proof the government must demonstrate specific intent under *Healy* or its own motivation, because there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims. Moreover, this is not what the government believed at the time; it believed instead that it could deport plaintiffs merely for associating with the PFLP, even though if plaintiffs "had been United States citizens, there would not have been a basis for their arrest." Webster Testimony, *supra*, at 95. Indeed, the government continued to adhere to this position until the Ninth Circuit rejected it in *AAADC v. Reno*.

On April 5, 1996, the government filed a motion for reconsideration of the Court's Order issued March 6, 1996 granting in part plaintiffs' motion to compel production of two memos which the government had claimed were privileged. Under Fed. R. Civ. P. 59(e), the government's motion is nearly three weeks late, and under Local Rule 7.16, it is improper because it does not set forth a ground for reconsideration. At the April 8, 1996 hearing, the government stated that its motion was filed last because it spent three weeks deciding whether to seek an interlocutory appeal, to

comply with the March 6 Order and seek to redact parts of the two memos, to seek reconsideration, or to take other action. Needless to say, this is not a valid excuse for failing to comply with the time limits of Rule 59(e), and is no excuse whatever for simply ignoring this Court's March 6 Order, which directed the government either to produce the two memos to plaintiffs or to submit its proposed redactions by March 25, 1996. The Court believes the government's blatant disobedience of the March 6 Order to be sanctionable. Nevertheless, as stated at the April 8 hearing, in view of the importance of the privilege issue, the Court will consider the government's motion. However, the Court wishes to make it clear to the parties that it will tolerate no such conduct in the future. In addition, plaintiffs filed on April 8, 1996 a request for reconsideration of the Court's Order issued March 25, 1996 denying plaintiffs' motion for attorney's fees. This request was thus also untimely. While the Court will consider plaintiffs' request as well, the Court hereby warns the parties that such indulgence will not continue indefinitely.

IT IS SO ORDERED.

DATED: 4/25/96

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 94-55405, 94-55444 AND 95-55177

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE; ARAB AMERICAN DEMOCRATIC FEDERATION; ASSOCIATION OF AMERICAN UNIVERSITY GRADUATES; IRISH NATIONAL CAUCUS; PALESTINE HUMAN RIGHTS CAMPAIGN; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MICHAEL BOGOPOLSKY; DARREL MEYERS; SOUTHERN CALIFORNIA INTER-FAITH TASK FORCE ON CENTRAL AMERICA; AIAD KHALED BARAKAT; KHADER MUSA HAMIDE; NUANGUGI JULIE MUNGAI; AMJAD MUSTAFA OBEID; AYMAN MUSTAFA OBEID; NAIM NADIM SHARIF; MICHAEL IBRAHIM SHEHADEH; BASHAR AMER; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; FUND FOR FREE EXPRESSION; AMERICAN FRIENDS SERVICE COMMITTEE, PLAINTIFFS-APPELLANTS

v.

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.; ERNEST E. GUSTAFSON, DISTRICT DIRECTOR; IMMIGRATION & NATURALIZATION SERVICE, DEFENDANTS-APPELLEES

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE; ARAB AMERICAN DEMOCRATIC FEDERATION; ASSOCIATION OF AMERICAN UNIVERSITY GRADUATES; IRISH NATIONAL CAUCUS, ET AL., PLAINTIFFS-APPELLEES

v.

JANET RENO; DORIS MEISSNER; HAROLD EZELL; C.M. MCCULLOUGH, ET AL., DEFENDANTS-APPELLANTS

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE;
ARAB AMERICAN DEMOCRATIC FEDERATION;
ASSOCIATION OF AMERICAN UNIVERSITY GRADUATES;
IRISH NATIONAL CAUCUS; AIAD BARAKAT;
NAIM SHARIF, ET AL., PLAINTIFFS-APPELLEES

v.

JANET RENO; DORIS MEISSNER; HAROLD EZELL;
GUSTAVO DE LA VINA; ERNEST E. GUSTAFSON;
RICHARD K. ROGERS, DISTRICT DIRECTOR;
IMMIGRATION & NATURALIZATION SERVICE,
DEFENDANTS-APPELLANTS

Argued and Submitted April 7, 1995

Decided Nov. 8, 1995

D.W. NELSON, Circuit Judge:

This opinion decides three cases that have been consolidated on appeal. Two of the cases involve claims of selective enforcement[1] of immigration laws in violation of the aliens' First Amendment rights, arising from the initiation of deportation proceedings under various provisions of the Immigration and Nationality Act ("the INA"), codified as amended at 8 U.S.C. § 1101 *et seq.* (1994), against Aiad Khaled Barakat, Naim Nadim Sharif, Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, and Amjad Mustafa Obeid (No. 94-55444, collectively referenced as "the Six"); and Khader Musa Hamide and Michael Ibrahim Shehadeh (No. 94-55405, collectively referenced as "Hamide and Shehadeh"). In No. 94-55444, the Attorney General and the Immigration and

[1] A selective enforcement claim is the immigration equivalent of a criminal selective prosecution claim.

Naturalization Service appeal the grant of a preliminary injunction against further deportation proceedings for the Six. In No. 94-55405, Hamide and Shehadeh appeal the district court's denial of a similar preliminary injunction based on lack of subject matter jurisdiction. In the third case, No. 95-55177, the INS appeals the district court's finding of a due process violation and its grant of a permanent injunction prohibiting the INS' use of undisclosed classified information against Barakat and Sharif in adjustment-of-status legalization proceedings pursuant to Section 245a of the Immigration Reform and Control Act of 1986 ("the IRCA"), Pub. L. 99-603, 100 Stat. 3394 (Nov. 6, 1986), codified as amended at 8 U.S.C. § 1255a (1994). We have jurisdiction to review orders granting or denying a preliminary injunction under 28 U.S.C. § 1292(a) (1) (1988) and jurisdiction to review the district court's final order granting a permanent injunction under 28 U.S.C. § 1291 (1988). We affirm the grant of a preliminary injunction against the INS in the proceedings to deport the Six, we affirm the grant of a permanent injunction against the INS preventing the use of undisclosed classified information against Barakat and Sharif in their legalization proceeding, and we vacate the district court's decision that it lacked jurisdiction to consider the selective enforcement claim of Hamide and Shehadeh and remand for the district court to address that claim on the merits.

FACTUAL AND PROCEDURAL BACKGROUND

After initiating deportation proceedings, the INS arrested the eight named aliens in this case in January 1987. They were detained for several weeks in maximum security prisons and then released

pending the outcome of deportation proceedings. The INS charged all but Mungai under various provisions of the McCarran-Walter Act of 1952 ("the 1952 Act")[2] for membership in an organization, the Popular Front for the Liberation of Palestine ("PFLP"), that allegedly advocates the doctrines of world communism. In

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[2] The provisions of the 1952 Act provided in relevant part for the deportation of

> (D) Aliens . . . who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dic-tatorship . . .;
>
> (F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety, of the unlawful assaulting or killing of any [government] officer or officers . . .; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;
>
> (G) Aliens who write or publish, . . . or knowingly cause to be circulated, distributed, printed, published, or displayed, . . . any written or printed matter, advocat-ing or teaching [the doctrines and activities prohibited in sections F and D];
>
> (H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision. 8 U.S.C. §§ 1251(a)(6)(D), (F), (G), (H) (1988).

addition, the Six were charged with non-ideological immigration violations under 8 U.S.C. § 1251(a)(2) (1988) (overstaying a visa). Amer was also charged under 8 U.S.C. § 1251(a)(9) (1988) (failing to maintain student status). Later, charges were added for both Ayman Obeid and Amjad Obeid for changing their nonimmigrant status by taking unauthorized employment. In February, 1987, Mungai was also charged under the McCarran-Walter Act, 8 U.S.C. § 1251(a)(6)(D), (G), and (H).

In April 1987, the individual plaintiffs and several organizations initiated an action for damages, a declaration that the provisions of the 1952 Act under which the eight were charged are unconstitutional facially and as applied, and injunctive relief against the investigation, arrest, and deportation of aliens pursuant to the challenged provisions. On April 23, 1987, just four days before the district court's hearing on a motion for a preliminary injunction, the INS dropped the 8 U.S.C. § 1251(a)(5) ideological charges against the Six, but it retained the non-ideological, technical violation charges. The INS also dropped the original charges against Hamide and Shehadeh; but on April 28, 1987, it brought new charges against them under 8 U.S.C. § 1251(a)(6)(F)(iii), alleging that they were deportable as members of an organization that advocates or teaches the unlawful destruction of property. Later, the INS added a charge under 8 U.S.C. § 1251(a)(6)(F)(ii), alleging that Hamide and Shehadeh were associated with a group that advocates the unlawful assaulting or killing of government officers.

In April and May of 1987, former FBI director William Webster testified to Congress that "[a]ll of them were arrested because they are alleged to be

members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation . . . in this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest." *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987). Also, at a press conference after the original charges were dropped against the Six, INS Regional Counsel William Odencrantz indicated that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP.

The district court issued orders on May 21, 1987 and June 3, 1987 holding that it had no jurisdiction over the 1952 Act claims of Hamide and Shehadeh on ripeness grounds. Hamide and Shehadeh unsuccessfully sought review of the statute by mandamus. *Hamide* v. *United States District Court*, No. 87-7249 (9th Cir. Feb. 24, 1988). When they again sought review in the district court, it found that their facial and as-applied constitutional challenges to the statute were not justiciable. *American-Arab Anti-Discrimination Committee* v. *Meese*, 714 F. Supp. 1060, 1064. (C.D. Cal. 1989), *aff'd in part, rev'd in part, American-Arab Anti-Discrimination Committee* v. *Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1991). Ruling on the claims of the Six, the district court found the challenged statutory provisions unconstitutionally overbroad. 714 F. Supp. at 1083-84. On review, the Ninth Circuit reversed the district court's holding on ripeness grounds. 970 F.2d at 510-12.

On April 5, 1991, after the repeal of the 1952 Act, the INS instituted new proceedings against permanent resident aliens Hamide and Shehadeh under the "terrorist activity" provision of the Immigration Act of 1990 ("the IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), codified as amended at 8 U.S.C. § 1251(a)(4)(B) (1994) (rendering deportable "[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity (as defined in Section 1182(a)))."[3] The status of the charges under the 1952 Act is not clear: the Government has asserted at different times that the prior charges and proceedings under that Act remain pending concurrent with the new proceedings, or that the new charges "amended" the basis of the deportation proceedings so that the "terrorist activity" charges are the only ones currently pending.

All eight aliens then filed suit in district court claiming that the INS had singled them out for selective enforcement of the immigration laws based on the impermissible motive of retaliation for constitutionally protected associational activity. On January 7, 1994, however, the district court granted summary judgment to the Government on Hamide's and Shehadeh's selective enforcement claim, finding that it lacked jurisdiction. At the same time, the

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[3] The IMMACT defines "engage in terrorist activity" as:

> to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time.

8 U.S.C. § 1182(a)(3)(B)(iii) (1994).

district court granted a motion for further discovery and a preliminary injunction against further deportation proceedings in the case of the Six.

Meanwhile, in June of 1987, Barakat and Sharif applied for legalization under the IRCA. In 1991, they received Notices of Intent to Deny because the INS, using undisclosed classified information, considered them excludable under former 8 U.S.C. § 1182(a)(28)(F).[4] Barakat and Sharif filed suit in district court challenging the use of classified information on several grounds, including a due process claim. The district court found that it had jurisdiction, and it issued a preliminary injunction against the confidential use of classified information. Following an *in camera*, *ex parte* examination of materials provided by the INS, the court concluded that use of the undisclosed information against Barakat and Sharif would constitute a due process violation, and it granted a permanent injunction against its use on January 24, 1995.

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[4] The former provision excluded:

> Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property.

8 U.S.C. § 1182(a)(28)(F).

DISCUSSION

I. JURISDICTION

As a threshold matter, we must determine whether the district court had jurisdiction to adjudicate these challenges to the INS' discretionary decisions and procedures. We review de novo the district court's decision regarding its subject matter jurisdiction. *Naranjo-Aguilera* v. *INS*, 30 F.3d 1106, 1109 (9th Cir. 1994).

A. SELECTIVE ENFORCEMENT CLAIMS

"To succeed on a selective prosecution claim, the defendant bears the burden of showing both 'that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive.'" *United States* v. *Bourgeois*, 964 F.2d 935, 938 (9th Cir.) (quoting *United States* v. *Wayte*, 710 F.2d 1385, 1387 (9th Cir. 1983), aff'd, 470 U.S. 598 (1985)), *cert. denied*, 506 U.S. 901, 113 S. Ct. 290, 121 L.Ed.2d 215 (1992).

1. *The Six Nonimmigrant Aliens*

The Government argues that the district court lacked jurisdiction because the aliens' claim of selective enforcement can be reviewed directly by the court of appeals only upon review of a final order of deportation. We disagree.

a. *The Statutory Scheme for Judicial Review*

Section 106 of the INA, as amended, provides exclusive judicial review in the courts of appeals for "all final orders of deportation" after exhaustion of "administrative remedies available to [the petitioner]

as of right." 8 U.S.C. §§ 1105a(a), (c) (1994).[5] Discretionary "determinations made during an incident to the administrative proceeding . . . and reviewable together by the Board of Immigration Appeals . . . are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a)." *Foti* v. *INS*, 375 U.S. 217, 229, 84 S. Ct. 306, 313-14, 11 L.Ed.2d 281 (1963). However, because of the need for a factual record beyond that which can be

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[5] The section provides, in relevant part:

> (a) Exclusiveness of procedure[:] The procedure prescribed by, and all the provisions of chapter 158 of Title 28 [the Hobbs Act,] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 1252(b) of this title, or comparable provisions of any prior Act, *except* that . . . (4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based . . . [and] (5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States . . . the court shall . . . (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court . . . for hearing de novo of the nationality claim. . . .
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. . . .

8 U.S.C. §§ 1105a(a), (c) (1994) (emphasis added).

cannot review many discretionary decisions of the INS as part of our review of a final deportation order. *See, e.g., Abedi-Tajrishi* v. *INS*, 752 F.2d 441, 443 (9th Cir. 1985) (finding no jurisdiction to review a discretionary decision when factual development is necessary); *Mohammadi-Motlagh* v. *INS*, 727 F.2d 1450, 1451, 1452 (9th Cir. 1984) (finding no jurisdiction for appellate review when the immigration judge and the Board of Immigration Appeals lack jurisdiction to review a district director's discretionary decision). When the provision for exclusive review in the courts of appeals is inapplicable, jurisdiction lies in the district court pursuant to the federal question statute, 28 U.S.C. § 1331, and pursuant to the general grant of power to review matters arising under the immigration laws, 8 U.S.C. § 1329. *See Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210, 88 S.Ct. 1970, 1973, 20 L.Ed.2d 1037 (1968); *Karmali* v. *INS*, 707 F.2d 408, 409 (9th Cir. 1983).

The decision to institute deportation proceedings, the basis for a selective enforcement claim, is a discretionary decision of the INS director that is not subject to review by either the immigration judge ("IJ") or the Board of Immigration Appeals ("BIA"). *See Lopez-Telles* v. *INS*, 564 F.2d 1302, 1304 (9th Cir. 1977). Both the IJ conducting the deportation proceeding and the Government agree that neither the IJ nor the BIA has jurisdiction to consider a selective enforcement claim during a deportation proceeding. Thus, we conclude that selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order.

The Government's argument that the selective enforcement claim in this case is "purely legal" and thus reviewable only in the court of appeals is unper-

suasive. Both prongs of the selective enforcement claim—disparate impact and discriminatory intent—require factual proof. *See United States* v. *Armstrong*, 48 F.3d 1508, 1513 (9th Cir. 1995) (en banc), *cert. granted*, — U.S. ——, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995). The district court ordered discovery and reviewed evidence from the aliens and from the Government that would not be available in a deportation proceeding. The aliens have submitted to the district court more than 450 pages of declarations, exhibits, and transcripts in support of their claims. In the course of factual development, for example, the INS has conceded that Amer is the only alien that the Los Angeles INS office has sought to deport for taking too few credits as a student, even though many such students have been reported to the INS. We therefore find that the district court had jurisdiction to consider these selective enforcement claims.

b. *The Government's Counterarguments*

The Government offers three additional arguments to defeat district court jurisdiction. First, it suggests that a selective enforcement claim in the immigration context is inappropriate, because the decision to enforce the immigration laws is a non-justiciable political question involving foreign policy decisions that are immune from judicial review. Second, the Government claims that if such claims are viable, the statutory scheme provides alternative mechanisms for review in the agency or the appellate courts. Third, the Government argues that even though discretionary claims fall outside the statutory provision for exclusive review and exhaustion, we should decline jurisdiction to consider these claims

on prudential ripeness grounds. We consider each of these arguments in turn.

(1) *Political Question*

The Government contends that the courts cannot consider an alien's selective enforcement claim because the Government's discretionary decision implicates foreign policy concerns that are non-justiciable political questions. *See, e.g., Baker* v. *Carr*, 369 U.S. 186, 208-213, 82 S.Ct. 691, 705-708, 7 L.Ed.2d 663 (1962) (discussing foreign policy issues as a basis for the political question doctrine).

There is, however, clear precedent for judicial recognition of selective enforcement claims. Although alienage classifications are closely connected to matters of foreign policy and national security, *see, e.g., Plyler* v. *Doe*, 457 U.S. 202, 219 n.19, 102 S.Ct. 2382, 2395 n.19, 72 L.Ed.2d 786 (1982); *Fiallo* v. *Bell*, 430 U.S. 787, 796, 97 S. Ct. 1473, 1480, 52 L.Ed.2d 50 (1977), "the judicial branch may examine whether the political branches have used a foreign policy crisis as an excuse for treating aliens arbitrarily," *Shahla* v. *INS*, 749 F.2d 561, 563 n.2 (9th Cir. 1984); *see also Yassini* v. *Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980) (noting that "serious questions might arise" if the INS disregarded constitutional protections). "[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine." *INS* v. *Chadha*, 462 U.S. 919, 942-43, 103 S.Ct. 2764, 2779-80, 77 L.Ed.2d 317 (1983). Thus, we can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake. *Id.* Contrary to the

Government's suggestion, the foreign policy powers which permit the political branches great discretion to determine which aliens to exclude from entering this country do not authorize those political branches to subject aliens who reside here to a fundamentally different First Amendment associational right. *See, e.g., Landon* v. *Plasencia*, 459 U.S. 21, 25-26, 103 S. Ct. 321, 325-326, 74 L.Ed.2d 21 (1982) (explaining the difference between exclusion of an alien upon initial entry and deportation of aliens who have been in the country); *see also Charles D. Weisselberg, The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 939-47 (noting that the power of exclusion stems from the sovereign power of the federal government over its territory). If we were to decline jurisdiction on this basis, we would, in essence, proclaim that the courts have no essential function in ensuring that aliens are not targeted by the INS in retaliation for exercising their acknowledged constitutional rights, and we would allow those rights to be forfeited without redress. Clearly, the foreign policy powers of the political branches do not extend that far.

(2) *Alternative Mechanisms for Review*

We also reject the Government's assertion that the Hobbs Act provisions provide a mechanism by which the courts of appeals may assume jurisdiction over factual issues for which a record cannot be developed in regular INS proceedings. *See* 28 U.S.C. § 2347(c) (allowing remand to the agency for factual development); 28 U.S.C. § 2347(b)(3) (allowing transfer to a district court for a de novo trial on an ancillary

matter). First, the remand provision is not applicable in this instance. *See, e.g., Ramirez-Gonzalez* v. *INS*, 695 F.2d 1208, 1213 (9th Cir. 1983) (finding that § 2347(c) is inapplicable to INS proceedings, because the regulations provide a means to petition to the BIA to reopen the proceedings, in its stead); *Ghorbani* v. *I.N.S.*, 695 F.2d 784, 787 n.4 (9th Cir. 1982) (finding that § 1105a(4), which requires judicial review of the administrative record, precludes application of the Hobbs Act provision for remand on matters for which the agency lacks jurisdictional authority).

Second, because § 1105a allows transfer to a district court exclusively for de novo review of citizenship claims, the general transfer provision available elsewhere under the Hobbs Act does not apply in the immigration context. Compare 8 U.S.C. §§ 1105a(a)(5), (7) with 28 U.S.C. § 2347(b)(3). Even those circuits that disagree with this circuit's interpretation that remand under § 2347(c) is not available have declined to apply § 2347(b)(3) to authorize a transfer under § 1105a to a district court for claims not addressable before the IJ and BIA. *See, e.g., Coriolan* v. *INS*, 559 F.2d 993, 1003 (5th Cir. 1977).

The Government mistakenly relies on *Public Util. Comm'r of Oregon* v. *Bonneville Power Admin.*, 767 F.2d 622 (9th Cir. 1985), which held that the courts of appeals have exclusive jurisdiction of actions challenging the constitutionality of administrative proceedings under an act regulating utility rates. *Id.* at 624-25. That case involved a question of the breadth of the statutorily mandated jurisdiction, where the wording of the statute was much broader than the INS statute in the present case. *See id.* at 625-26. The statutory jurisdictional mandate in § 1105a is narrower and, in appropriate instances,

permits equitable relief in the district court for constitutional and procedural challenges. *See McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 484, 494, 111 S.Ct. 888, 892, 897, 112 L.Ed.2d 1005 (1991) (interpreting § 1105a in the IRCA context to find district court jurisdiction to hear constitutional and statutory challenges to INS procedures when meaningful judicial review of the statutory and constitutional claims otherwise would be foreclosed).

(3) *Ripeness*

The Government also argues that this court should find that the district court lacked jurisdiction to hear these selective enforcement claims because of prudential ripeness concerns that are relevant to its jurisdiction to grant equitable relief. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), the Supreme Court established a two-pronged framework for ripeness analysis in the administrative agency context: courts should consider the fitness of the issues for judicial review and the hardship to the parties involved. *Id.* at 148-49, 87 S. Ct. at 1515-16. The "core principle" is that statutory requirements should not be construed to cause "irreparable injuries to be suffered" or the loss of "crucial collateral claims." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11, 96 S.Ct. 893, 900-01 n.11, 47 L.Ed.2d 18 (1976). We therefore agree with the Six that their claim is ripe for review, because (1) the chill to their First Amendment rights is an irreparable injury that cannot be vindicated by post-deprivation review and (2) exhaustion through the deportation proceeding would be futile, in that the IJ and BIA cannot consider and develop facts about INS'

enforcement policies, practices, or motives, which are not subject to change through further agency interpretation.

(a) *Hardship*

The Supreme Court's overbreadth doctrine rests on the proposition that an overbroad statute has a chilling effect on First Amendment rights that cannot be vindicated through the normal channels of defense to a prosecution: that is, the legal and practical value of the First Amendment right may be destroyed if not vindicated before trial. *See Dombrowski* v. *Pfister*, 380 U.S. 479, 486-89, 85 S. Ct. 1116, 1120-22, 14 L.Ed.2d 22 (1965). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L.Ed.2d 547 (1976). Courts thus grant extraordinary relief because "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection" so that "the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights." *In re Asbestos School Litigation (Pfizer Inc.* v. *The Honorable James T. Giles)*, 46 F.3d 1284, 1294 (3d Cir. 1994). Even in the context of state criminal prosecutions, where federalism concerns raise additional barriers to the federal courts' exercise of equitable jurisdiction, federal courts refuse to abstain in cases involving a bad faith prosecution that has little expectation of a valid conviction or is initiated to retaliate for or discourage the exercise of consti-

tutional rights. *See, e.g., Lewellen* v. *Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988) (finding that the district court need not abstain when state prosecutors brought charges against an African American attorney in retaliation for his exercise of constitutional rights), *cert. denied*, 489 U.S. 1033, 109 S. Ct. 1171, 103 L.Ed.2d 229 (1989). We find that the perpetual threat of deportation based on group affiliation constitutes the kind of irreparable injury that is relevant to the ripeness inquiry here.

(b) *Fitness*.

We also agree with the Six that exhaustion would be a futile exercise because the agency does not have jurisdiction to review a selective enforcement claim. *Lopez-Telles*, 564 F.2d at 1304. "If the agency lacks authority to resolve the constitutional claims, there is little point to requiring exhaustion." *Xiao* v. *Barr*, 979 F.2d 151, 154 (9th Cir. 1992). Furthermore, we customarily decline to apply the prudential ripeness doctrine when exhaustion would be a futile attempt to challenge a fixed agency position. *See, e.g., El Rescate Legal Serv.* v. *Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1991). Other circuits have similarly found exhaustion futile unless "there is genuine doubt as to what is going to happen in the administrative process." *Rafeedie* v. *I.N.S.*, 880 F.2d 506, 514 (D.C. Cir. 1989).

Contrary to the Government's assertion, our earlier opinion in this case is not dispositive here. *See American-Arab Anti-Discrimination Committee*, 970 F.2d at 510-12. We held that prudential concerns weighed against the district court's assuming jurisdiction of the unconstitutional-as-applied challenge

to the 1952 Act, because the factual record developed in the agency proceeding to support the application of the statute would assist our review of that claim. *Id.* at 510-511. In contrast, this case does not involve a facial or as-applied challenge to a statute. These selective enforcement claims are not moot now, and the speculative possibility that they may be rendered moot in the future is not sufficient to require futile exhaustion of administrative remedies. Therefore, we hold that the district court properly exercised jurisdiction over the nonimmigrant aliens' selective enforcement claims.

2. *The Permanent Resident Aliens, Hamide and Shehadeh*

The two permanent resident aliens, Hamide and Shehadeh, also contend that the district court had jurisdiction to consider their selective enforcement claims. Unlike the Six, Hamide and Shehadeh have been charged solely under provisions, in both the 1952 Act and the IMMACT, that are based on affiliation with disfavored political organizations. Because the posture in which their claims are presented is different from that of the claims of the Six, we consider them separately.

The basis for jurisdiction over Hamide's and Shehadeh's claims is essentially the same as that found to support district court jurisdiction for the Six. The exclusive mechanism for judicial review of a final deportation order does not provide a means of review of a selective enforcement claim for which the IJ and BIA lack adjudicatory authority. *See* the discussion in Part I.A.1.a. *supra*. Although the Government asserts that no factual development is

necessary beyond that which the Government will provide in the deportation proceeding as part of its case under the IMMACT, the agency proceeding cannot develop a factual record regarding patterns and practices of the INS treatment of aliens who may be similarly situated supporters of lawful activities of alleged terrorist organizations. *Id.* Thus, the legal arguments in Part I.A.1.a. apply as well to Hamide and Shehadeh: their selective enforcement claims can be considered only in the district court.

The Government argues—and the district court ultimately agreed—that the ripeness concerns relevant to these claims are different because the motive for targeting Hamide and Shehadeh cannot be considered truly pretextual, in that both the 1952 Act and the IMMACT provisions under which they are currently charged treat some aspect of affiliation as a basis for deportation. The Government essentially argues that the legal issue addressed in the deportation proceeding—how the IMMACT's terrorist activity provisions should be interpreted and whether the aliens' actions satisfy those requirements—is the same issue that must be addressed, under the second prong of the selective enforcement claim, to determine whether the Government unconstitutionally has singled out these aliens on the basis of an impermissible motive of retaliation for exercise of their First Amendment rights.

We conclude that the claim that Hamide and Shehadeh assert here is broader than that which they may raise in a defense of deportation. The legal issue that the IJ and the BIA will address is whether the aliens' actions satisfy the requirements of the IMMACT's terrorist activity provisions; however, the issue underlying the selective enforcement claim

of impermissible motive is whether the support of lawful activities of a disfavored organization that may also engage in unlawful terrorist activities provides a constitutional basis for deportation of a permanent resident alien. The selective enforcement claim necessarily imposes a different focus and requires the court to consider patterns of INS prosecutions rather than a particular application of a statute. *Montes* v. *Thornburgh*, 919 F.2d 531, 535 (9th Cir. 1990) (finding § 1105a inapplicable to suits alleging a pattern and practice of constitutional violations).

We hold, therefore, that the district court erred in declining jurisdiction on ripeness grounds, and we remand for further proceedings in accord with this decision.

B. CLASSIFIED INFORMATION CLAIM

In 1986, Congress amended the immigration laws to allow legalization of undocumented aliens who had entered the country before January 1, 1982. IRCA, Pub. L. 99-603 § 201(a), 100 Stat. 3394 (Nov. 6, 1985), as amended and codified in 8 U.S.C. § 1255a (amending the Immigration and Nationality Act by adding Section 245a regulating adjustment of status). The act established exclusive jurisdiction in the courts of appeals for judicial review of denials of legalization on review of final orders of deportation. 8 U.S.C. § 1255a(f)(4).[6]

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[6] The judicial review provision states, in relevant part:

> (A) Limitation to review of deportation[:] There shall be judicial review of such a denial only in the judicial review of an order of deportation under Section 1105a of this title. (B) Standard for judicial review[:] Such judicial review shall be based solely upon the administrative record esta- blished at the time of the

1. *The Statutory Grant of Exclusive Jurisdiction*

The Government argues that Barakat and Sharif are challenging an individual determination in a legalization proceeding, and thus must exhaust their administrative remedies by undergoing the deportation proceeding before they are entitled to judicial review of their claim that use of undisclosed classified information to evaluate adjustment-of-status applications violates due process. Because the agency proceeding will not address the due process claim, however, the statutory exhaustion provision does not require the aliens to present their challenge to this INS practice through the exclusive review mechanism for final orders of deportation. *See McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 483-84, 111 S. Ct. 888, 891-92, 112 L.Ed.2d 1005 (1991) ("HRC ") (permitting district court consideration of claims that the INS engaged in unconstitutional procedural practices relating to acceptance of legalization applications). Barakat's and Sharif's due process claim is not unlike the due process violations that the Court found justiciable in HRC, which included routine, arbitrary denial of applications that were not supported by payroll records, maintenance of a secret list of employers whose supporting affidavits were routinely discredited, failure to provide interpreters at interviews, and failure to record or transcribe interviews. *See id* at 489 n. 9, 111 S. Ct. at 894 n.9. Such due process violations concern the implementation of practices to carry out the legalization program, rather than an

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review by the appellate author-ity. 8 U.S.C. § 1255a(f)(4).

"individual [eligibility] determination." *See id.* at 498, 111 S.Ct. at 899. "Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to [adjustment of] status." *Id.* at 495, 111 S. Ct. at 897. Thus, the aliens are not challenging the particular outcome of the application, but the collateral procedure of using undisclosed classified information that the INS deems generally available in processing legalization applications. *See id.* at 492, 111 S. Ct. at 896; *Campos* v. *Nail*, 940 F.2d 495, 497 (9th Cir. 1991) (finding jurisdiction when the plaintiffs "do not seek the determination of the merits of any individual deportation order, but challenge a judge's blanket policy on constitutional grounds"). Therefore, we conclude that the statutory grant of exclusive appellate jurisdiction for review of deportation orders does not preclude district court jurisdiction over these due process claims.

2. *Prudential Ripeness Concerns*

The Government also contends that prudential ripeness concerns mandate a denial of district court jurisdiction. Soon after the HRC decision, the Supreme Court addressed the relationship between the statutory exclusive review provision for INS deportation orders and the prudential ripeness concerns in the IRCA adjustment-of-status context. *See Reno* v. *Catholic Social Services*, 509 U.S. 43, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) ("*CSS*") (considering the INS practice of rejecting without consideration any agricultural worker legalization applications from aliens whom INS employees deemed a priori ineligible under the statute). The *CSS* Court

acknowledged that prudential ripeness concerns usually preclude jurisdiction "unless the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" *Id.* at—, 113 S. Ct. at 2495 (quoting *Abbott Labs.*, 387 U.S. at 148-49, 87 S. Ct. at 1515-16). Although "[i]n some cases the promulgation of a regulation will itself affect parties concretely enough to satisfy this requirement," *id.* at——, 113 S. Ct. at 2495, the prudential doctrine and the statutory exclusive grant of jurisdiction "ordinarily" "dovetail" so that the claim ripens only at the point that the exclusive review provision applies, thus delaying review of constitutional challenges until the appellate review of a final deportation order. *Id.* at ——, 113 S.Ct. at 2497.

The Government argues that *CSS* bars any pre-enforcement review because legalization is a benefit whose denial does not place the applicant in the dilemma of paying a cost to comply or paying a penalty for noncompliance. *See CSS*, 509 U.S. at——, ——, 113 S. Ct. at 2495-96 (noting that the challenged regulations adopted to develop the criteria for temporary resident status merely limited access to a benefit not automatically bestowed on eligible aliens); *Abbott Labs.*, 387 U.S. 152-53, 87 S. Ct. at 1517-18 (discussing the compliance dilemma as one factor in determining ripeness). While we acknowledge that a positive outcome of the legalization process is a benefit for the alien, we disagree that this factor is determinative in the ripeness analysis of this due process claim, which challenges a collateral procedure limiting access to an entitlement. *See, e.g., Atlantic Richfield Co.* v. *United States Dep't of Energy*, 769 F.2d 771, 782-83 (D.C. Cir. 1984) (noting that ripeness concerns balance all aspects of hardship

to the parties against the extent to which strict adherence to ripeness requirements will ensure that issues are better fit for judicial review).

a. *Fitness: Concrete Effect and Adequacy of Agency Record*

The Supreme Court recognized that an agency action may result in immediate adverse consequences or pose a realistic threat of such harm. *CSS*, 509 U.S. at ——, 113 S.Ct. at 2495. Challenges to the promulgation of a regulation, as in *CSS*, raise ripeness concerns that the courts will become involved in "abstract disagreements over administrative policies." *Abbott Labs.*, 387 U.S. at 148, 87 S. Ct. at 1515. Here, however, the INS' determination to adjudicate nondiscretionary statutory entitlements on the basis of undisclosed information represents a concrete controversy: by applying for legalization, each alien has already taken whatever "affirmative steps . . . he could take before the INS blocked his path." *CSS*, 509 U.S. at——, 113 S. Ct. at 2496.

Furthermore, agency actions that "pre-determine" the future action of the agency generate a sufficiently concrete effect to be cognizable by the courts. *See, e.g., Portland Audubon Society* v. *Babbitt*, 998 F.2d 705, 707 (9th Cir. 1993) (reviewing the Secretary of Interior's decision not to supplement an environmental impact statement with new information relating to the effects of logging on the northern spotted owl). In Portland Audubon, we held that the decision was ripe for review prior to the initiation of individual sales "because, to the extent these [agency actions] pre-determine the future, the Secretary's failure to comply with [the] NEPA [statute]

represents a concrete injury which would undermine any future challenges by plaintiffs." *Id.* at 708. The Notices of Intent to Deny similarly "pre-determined the future" and concretely affected Barakat and Sharif by subjecting them to a legalization determination based on secret information.

Moreover, these claims are ripe because the factfinding necessary for determination of the claim can only occur at the district court. *See, e.g., CSS*, 509 U.S. at —— - ——, 113 S. Ct. at 2499-2500 (recognizing the importance of an administrative record that would permit review on appeal from a deportation order); *Tooloee* v. *INS*, 722 F.2d 1434, 1437-38 (9th Cir. 1983) (same). In the present case, the district court appropriately applied the *Mathews* balancing test, in order to determine whether the administrative procedure satisfies due process. Under the test, the court must weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976). After ordering discovery, the district court granted the permanent injunction based on factual development in the following areas:

> 1) the importance to the plaintiffs of their immigration applications, 2) the risk that the plaintiffs will be erroneously deprived of temporary resident or other legalized status, 3) the likelihood that allowing access to the classified information would reduce the risk of an erroneous deprivation, and 4) the Government's interest in keeping certain information confidential because of national security concerns, together with the Government's interest in denying legalization to people who are members of groups such as the PFLP.

Because these issues do not come within the scope of the IRCA review process, the legalization and deportation proceedings cannot generate a record for review. *See HRC*, 498 U.S. at 493, 111 S. Ct. at 896 (noting that the administrative review process would not generate an adequate record for review of due process claims such as lack of translators). No facts relevant to the due process determination can be adduced at the agency hearing because that hearing proceeds under the premise that use of undisclosed information against the alien is legal. *See, e.g., Rafeedie*, 880 F.2d at 516-17 (stating that "any 'factual record' that [a hearing] would generate is unlikely to be more than a catalogue of the Government's untested allegations and [the alien's] not directly responsive denials").

b. *Hardship: First Amendment Chill and Right to Work*

As noted earlier, injury to First Amendment rights more readily justifies a finding of ripeness "due to the chilling effect on protected expression which delay

might produce." *Planned Parenthood* v. *Kempiners*, 700 F.2d 1115, 1122 (7th Cir. 1983) (Cudahy, J. concurring) (noting that the statute in question forced a choice between exercising First Amendment rights to speak on the abortion issue and risking loss of eligibility for state benefits). Since the Government has targeted these aliens because of their association with the PFLP, the Notices of Intent to Deny had a palpable chilling effect. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-57, 108 S. Ct. 2138, 2142-44, 100 L.Ed.2d 771 (1988) (permitting a challenge to a licensing statute because it immediately "intimidates parties into censoring their own speech"); *Ripplinger* v. *Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989) (permitting a preenforcement challenge to a statute because of its immediate "chilling effect on protected speech"). We agree with the D.C. Circuit that irreparable injury to First Amendment rights results from the use of secret information about presumptively protected affiliations in INS proceedings, since an alien denied legalization faces loss of his right to work and to support his family, *see HRC*, 498 U.S. at 490-91, 111 S. Ct. at 895, not because of his "illegitimate activities, but [because of] his legitimate activities as an outspoken critic of the Government's foreign policy." *Rafeedie*, 880 F.2d at 517. When weighed against the minimal benefit to judicial or administrative interests from further administrative proceedings, these injuries tip the scales against requiring exhaustion. *Id.* at 518.

We hold that the district court appropriately exercised jurisdiction over Barakat's and Sharif's claim that use of undisclosed classified information in the legalization process violates due process requirements because it is a collateral, procedural challenge to an INS practice that requires factfinding beyond the purview of the agency proceedings and does not challenge the INS' individual determination of a substantive eligibility criteria. *See id.* Therefore, it falls under the *HRC* rule in accord with our *Naranjo* decision that district courts have jurisdiction when the "limited review scheme would be incapable of generating an administrative record adequate for effective judicial review." *Naranjo-Aguilera*, 30 F.3d at 1113.

II. MERITS

A. THE PRELIMINARY INJUNCTION AGAINST SELECTIVE ENFORCEMENT

1. *Standard of Review*

We review a district court's issuance of a preliminary injunction for abuse of discretion, which occurs if the court bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Miller v. California Pacific Medical Center*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc). A preliminary injunction is warranted where plaintiffs show "either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989).

2. *Selective Enforcement Justifies a Preliminary Injunction*

The district court determined that the Six were likely to succeed on their selective enforcement claims. We reiterate here the prima facie elements of the claim: (1) "others similarly situated have not been prosecuted" (disparate impact) and (2) "the prosecution is based on an impermissible motive" (discriminatory motive). *United States v. Aguilar*, 883 F.2d 662, 705 (9th Cir. 1989) (quoting *United States v. Lee*, 786 F.2d 951, 957 (9th Cir. 1986)), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 751, 112 L.Ed.2d 771 (1991); *see also Wayte v. United States*, 470 U.S. 1063 598, 608, 105 S. Ct. 1524, 1531, 84 L.Ed.2d 547 (1985).

a. *Control Group and Evaluation of Evidence*

Crucial to the analysis is the establishment of the appropriate control group—a group that is similarly situated in all respects to those who claim selective enforcement, except for the attribute on which the selective enforcement claim rests. *Aguilar*, 883 F.2d at 706-07; *United States v. Steele*, 461 F.2d 1148, 1150 (9th Cir. 1972) (finding an inference of discrimination where the defendant, who was a vocal advocate of non-compliance with census laws, was prosecuted while six others, who were not vocal though equally against compliance, were not prosecuted).

The district court selected as a control group those aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates. The factor thus isolated is association with governmentally disfavored political views, the ground on

which the six aliens claim they are being prosecuted. The court found that the government's proffered evidence of prosecution of similarly situated individuals was insufficient to defeat the disparate impact claim, because the cases involved individuals who had actually committed terrorist acts, rather than persons who merely associated with terrorist organizations. The court's conclusion that the aliens presented prima facie evidence of disparate impact is not clearly erroneous.

b. *First Amendment Guarantees in the Deportation Context*

The court also found that the statements of Webster and Odencrantz, which reveal that the aliens have been targeted because of their membership in terrorist organizations, established the prima facie element of impermissible motive, because the Government acknowledges that United States citizens cannot be arrested for the same behavior. Thus, the gravamen of this case is the legal question whether aliens may be deported because of their associational activities with particular disfavored groups, or whether aliens who reside within the jurisdiction of the United States are entitled to the full panoply of First Amendment rights of expression and association. "We review de novo issues of law underlying the district court's preliminary injunction." *Miller*, 19 F.3d at 455.

(1) *First Amendment Standards Protect Associational Activities*

The Government does not dispute that the First Amendment protects a citizen's right to associate with a political organization; even if that association includes ties with groups that advocate illegal conduct or engage in illegal acts, the power of the Government to penalize association is narrowly circumscribed. "[T]he right of association is a 'basic constitutional freedom' . . . [that] lies at the foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 637, 46 L.Ed.2d 659 (1976) (citations omitted). Government cannot "deny[ ] rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. 169, 185-86, 92 S. Ct. 2338, 2348, 33 L.Ed.2d 266 (1972).

Under the standard enunciated by the Supreme Court in *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969), advocacy may be punished only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447, 89 S. Ct. at 1829. The Government must establish a "knowing affiliation" and a "specific intent to further those illegal aims." *Healy*, 408 U.S. at 186, 92 S. Ct. at 2348. "Guilt by association alone" violates the First Amendment. *Robel*, 389 U.S. at 265-66, 88 S. Ct. at 424-25.

Here, the Government has not attempted to show that the aliens' association with the PFLP satisfies the currently applicable *Brandenburg* standard; instead, it argues that aliens are not entitled to the same First Amendment protections that citizens enjoy.

(2) *Aliens in the United States Enjoy Full First Amendment Rights*

The Supreme Court has consistently distinguished between aliens in the United States and those seeking to enter from outside the country, and has accorded to aliens living in the United States those protections of the Bill of Rights that are not, by the text of the Constitution, restricted to citizens. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5, 73 S. Ct. 472, 477 n.5, 97 L.Ed. 576 (1953). Accordingly, the Court has explicitly stated that "[f]reedom of speech and of press is accorded aliens residing in this country." *Bridges* v. *Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449, 89 L.Ed. 2103 (1945); *see also United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 1064, 108 L.Ed.2d 222 (1990); *Kwong Hai Chew*, 344 U.S. at 596-97 n.5, 73 S.Ct. at 477-78 n.5. "None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority." *Bridges*, 326 U.S. at 161, 65 S.Ct. at 1455 (Murphy, J., concurring), *quoted* in *Kwong Hai Chew*, 344 U.S. at 596-97 n.5, 73 S. Ct. at 477-78 n.5.

Furthermore, the values underlying the First Amendment require the full applicability of First Amendment rights to the deportation setting. Thus, "read properly, *Harisiades* establishes that deportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights." T. Alexander Aleinikoff, *Federal Regulation of*

Aliens and the Constitution, 83 Am. J. Int'l L. 862, 869 (1989).

Because we are a nation founded by immigrants, this underlying principle is especially relevant to our attitude toward current immigrants who are a part of our community. *See, e.g., Verdugo-Urquidez*, 494 U.S. at 265, 110 S. Ct. at 1060 (recognizing that aliens with substantial ties through family and work form part of our "national community"). Aliens, who often have different cultures and languages, have been subjected to intolerant-and harassing conduct in our past, particularly in times of crises. *See, e.g.*, Alien Enemies Act of 1798, Act of June 25, 1798, ch. 58, 1 Stat. 570, 571 (authorizing the President to expel "all such aliens as he shall judge dangerous to the peace and safety of the United States"); John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925*, 229-31 (2d ed. 1963) (describing the Palmer Raids of 1919-20). It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst. See *Bridges*, 326 U.S. at 149, 65 S. Ct. at 1450 ("[W]here the fate of a human being is at stake the presence of the evil purpose may not be left to conjecture.").

(3) *The Government's Arguments Are Inapplicable to Deportation*

(a) *Deportation Differs Significantly From Exclusion*

The Government's reliance on *Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L.Ed.2d 683

(1972), is misplaced. Nor do we find dispositive our earlier decision to apply the *Kleindienst* standard to review the Attorney General's decision to require listing of all organizations of which an applicant for naturalization is a member: we noted that "aliens at naturalization are not necessarily entitled to the full protection of the First Amendment arguably afforded in deportation hearings." *Price*, 962 F.2d at 843 n.7.

In *Kleindienst*, the Court merely upheld the Attorney General's discretion to deny a waiver to allow an entry visa to a Marxist professor from Belgium who had violated the restrictions on his visa during an earlier visit. 408 U.S. at 756-60, 92 S. Ct. at 2578-80.

The *Kleindienst* analysis expressly rests upon the Attorney General's discretionary power to determine who may enter the country from abroad, a power exercised by the political branches as a derivative of the sovereign power to "defend[ ] the country against foreign encroachment and dangers." *Kleindienst*, 408 U.S. at 765, 92 S. Ct. at 2582-83; *see also Landon v. Plasencia*, 459 U.S. 21, 28, 103 S. Ct. 321, 326, 74 L.Ed.2d 21 (1982). The essential distinction between exclusion and deportation rests on this territorial concept of a diverse national community within which citizens and resident aliens interact. *See Kwong Hai Chew*, 344 U.S. at 597 n.5, 73 S. Ct. at 477-78 n.5 (noting that constitutional protection of aliens stems from "the alien's presence within [the] territorial jurisdiction") (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 771, 70 S. Ct. 936, 940, 94 L.Ed. 1255 (1950)). The Framers explicitly recognized that aliens within this country participate in a reciprocal relationship of societal obligations and correlative protection. "As [aliens] owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and

advantage." James Madison, *Report on the Virginia Resolutions, reprinted in* Jonathan Elliot, *4 Debates on the Federal Constitution* 546, 556 (1907). The Supreme Court has also acknowledged a "long-standing distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings" that corresponds to the basic difference between protected status within the national community and unprotected status at the threshold of admission. *Plyler v. Doe*, 457 U.S. 202, 212-13 n.12, 102 S. Ct. 2382, 2392 n.12, 72 L.Ed.2d 786 (1982). Accordingly, we decline to extend *Kleindienst* to apply to the deportation context.

(b) *Relevance of the Civil Nature of Deportation*

We also reject the Government's contention that First Amendment constitutional protections are unnecessary because deportation is not a criminal proceeding. It is true that some constitutional protections, available to citizens and aliens alike in the criminal setting, do not apply in civil proceedings and thus do not apply to the non-criminal deportation proceedings. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (holding that the exclusionary rule is inapplicable to deportation); *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (holding that the Ex Post Facto Clause is inapplicable to deportation). However, because the First Amendment's protections apply equally to non-criminal and criminal proceedings, *see, e.g., New York Times Co.*, 376 U.S. at 277, 84 S. Ct. at 724, constitutionally protected activities that the Government cannot punish

by means of a criminal statute are likewise beyond its reach in a deportation proceeding.

(c) *Relevance of Congress' Plenary Power*

We find no merit in the Government's argument that the broad authority of the political branches over immigration matters justifies limited First Amendment protection for aliens at deportation. This is a variant of its jurisdictional argument that immigration issues that involve foreign policy concerns are non-justiciable political questions.

First, although Congress and the President may regulate aliens' admission and residence in the country, that regulation must be "consistent with the Constitution." *Fong Yue Ting v. United States*, 149 U.S. 698, 712, 13 S. Ct. 1016, 1021, 37 L.Ed. 905 (1893). "Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation." *Bridges*, 326 U.S. at 161, 65 S. Ct. at 1455 (Murphy, J., concurring); *see also Chadha*, 462 U.S. at 940-41, 103 S.Ct. at 2778-79. Thus, Congress' less restrained power to decide which aliens to exclude from entry, using processes and procedures that would be constitutionally suspect for citizens, is not dispositive regarding the constitutional constraints that operate at deportation. *Cf. Haitian Centers Council, Inc.*, 509 U.S. at —— - ——, 113 S. Ct. at 2560-61 (acknowledging the "important distinction" between deportation and exclusion in upholding the President's power to establish foreign policy reasons for repatriation of undocumented aliens intercepted on the high seas); *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977) (upholding immigration

preference categories for aliens at entry); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953) (upholding summary processes for exclusion of aliens at entry).

Second, our First Amendment jurisprudence rests on the fundamental principle that limitations on First Amendment rights are themselves damaging to the values underlying First Amendment protections. *See, e.g., Dombrowski*, 380 U.S. at 486-89, 85 S. Ct. at 1120-22. If aliens do not have First Amendment rights at deportation, then their First Amendment rights in other contexts are a nullity, because the omnipresent threat of deportation would permanently chill their expressive and associational activities. *See* Part I.A.1.b.(3).

(d) *Inapplicability of Exceptions to First Amendment Protections*

Nor are the contextual restrictions on speech that the Supreme Court has upheld in certain institutional settings with special needs analogous to the proposed restrictions on aliens subject to deportation. *See, e.g., Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270-73, 108 S. Ct. 562, 569-71, 98 L.Ed.2d 592 (1988) (schools); *Turner v. Safley*, 482 U.S. 78, 89-93, 107 S. Ct. 2254, 2261-63, 96 L.Ed.2d 64 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) (military); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (limitations on election campaign contributions); *Civil Serv. Comm. v. National Assoc. of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L.Ed.2d 796 (1973) (restrictions on federal employee

political activities). The speech in issue here is not confined to a particular setting.

(e) *Relevance of Other Distinctions Among Resident Aliens*

We reject the government's contention that we apply gradations of First Amendment protection parallel to the rational distinctions that are permissible pursuant to the Equal Protection Clause in determining which citizens and aliens may receive particular government benefits. *See, e.g. Mathews v. Diaz*, 426 U.S. 67, 83-84, 96 S. Ct. 1883, 1893-94, 48 L.Ed.2d 478 (1976) (upholding a five-year residency requirement for medicare benefits for aliens); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100-101, 96 S. Ct. 1895, 1903-04, 48 L.Ed.2d 495 (1976) (holding that an arbitrary regulation barring aliens from employment in the federal civil service violates due process, though suggesting that a classification based on a legitimate "overriding national interest" would not violate equal protection). Ordinary equal protection analysis requires only that the government bestow benefits in accord with classifications that rationally satisfy the stated government objective. *See, e.g., Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-72, 99 S.Ct. 2282, 2291-93, 60 L.Ed.2d 870 (1979). In contrast, to deny citizens or aliens some measure of their admitted rights to First Amendment associational freedom would be to nullify the right in its entirety. The Government begs the question in asserting that differential treatment is merited because these six aliens with technical visa violations are at the bottom of the sliding scale of alien connections to this country; underlying this

contention is the assumption that the Government can use the pretext of technical violations to expel aliens on the basis of their group affiliations. That is the heart of the selective enforcement claim under consideration.

The aliens have provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws. The aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights. We conclude, therefore, that the district court did not abuse its discretion in granting a preliminary injunction against continued deportation proceedings for the Six.

B. THE DUE PROCESS CHALLENGE TO THE USE OF CLASSIFIED INFORMATION

1. *Standard of Review for a Permanent Injunction*

The district court's grant of a permanent injunction is reviewed "for an abuse of discretion or application of erroneous legal principles." *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1994) (quoting *Dexter v. Kirschner*, 984 F.2d 979, 982 (9th Cir. 1992)). Questions of law or mixed questions of law and fact implicating constitutional rights are reviewed de novo. *LaDuke*, 762 F.2d at 1322. The requirements for the issuance of a permanent injunction are "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Id.* at 1330 (citations omitted).

2. *Appropriateness of the Permanent Injunction*

a. *Applicability of Due Process Protections to Aliens*

Aliens who reside in this country are entitled to full due process protections. *Diaz*, 426 U.S. at 77, 96 S. Ct. at 1890 (citations omitted); *see also Plasencia*, 459 U.S. at 32, 103 S. Ct. at 329 (finding that a returning longtime resident alien, unlike an alien seeking initial admission, has due process rights to an exclusion hearing); *Mezei*, 345 U.S. at 212, 73 S. Ct. at 629 (1953) (stating that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law").

The Government does not dispute that the Due Process Clause protects Barakat and Sharif, but it contends that reliance on undisclosed information to determine legalization satisfies the demands of due process.

b. *Statutory and Regulatory Authority for Summary Process*

Barakat and Sharif applied for legalization in 1987. Section 201(a)(1) of IRCA establishes a two-step process by which illegal aliens who satisfy the eligibility requirements receive temporary resident status and then, after an additional time in the country, permanent resident status. 8 U.S.C. § 1255a. Among other criteria, the alien must demonstrate admissibility as an immigrant. 8 U.S.C. § 1255a(a)(4). The Attorney General must grant temporary and permanent status if the applicants satisfy the statutory criteria. 8 U.S.C. §§ 1255a(a), (b).

At the time that Barakat and Sharif applied for legalization, the INS regulations required that all issues of statutory eligibility for immigration benefits, including legalization, be determined solely on the basis of information in the record disclosed to the applicant. 8 C.F.R. § 103.2(b)(3)(ii) (1990); *see also* 8 C.F.R. §§ 103.2(b)(3)(iii), (iv) (1990); 8 C.F.R. § 242.17 (1994) (allowing use of undisclosed, classified information only for discretionary decisions). However, after a three-year delay, the INS finally issued Notices of Intent to Deny to Barakat and Sharif in March 1991, pursuant to amended regulations, effective upon publication as interim rules in January 1991, that extended the confidential use of classified information to statutory entitlement determinations. 8 C.F.R. §§ 103.2(b)(3)(ii), (iv) (1994) (as amended). The INS claimed that the information's "protection from unauthorized disclosure is required in the interests of national security, as provided in 8 C.F.R. § 103.2(b)(3)(iv)."

The Government cites Section 235(c) of the Immigration and Nationality Act, 8 U.S.C. § 1225(c) (as amended), as authority for use of the undisclosed classified information in the legalization determination. That statute establishes the powers of INS officers to inspect aliens "seeking admission or readmission," 8 U.S.C. § 1225(a), to temporarily detain aliens who are not entitled to enter "at the port of arrival," 8 U.S.C. § 1225(b), and to exclude aliens on the particular finding by the Attorney General that confidential information supports that exclusion, 8 U.S.C. § 1225(c) (allowing summary process for exclusion). We do not, however, accept the proposition that denying a resident alien legalization is the same thing as "exclusion".

Use of summary process in settings other than exclusion raises troubling due process concerns. *See, e.g., Kwong Hai Chew*, 344 U.S. 590, 73 S. Ct. 472 (barring the INS from using summary process to exclude a resident alien returning from abroad, because he was entitled to a hearing as of constitutional right). Thus, even reentering permanent resident aliens, who enjoy few rights because of the admitted power of Congress over entry into the country, are entitled to additional due process safeguards when subjected to the summary exclusion process. *Rafeedie*, 880 F.2d at 512, *on remand*, 795 F. Supp. 13, 20 (D.D.C. 1992) (applying the *Mathews* balancing test to determine that subjecting a returning resident alien, who was accused of being a PFLP officer, to summary exclusion proceedings utilizing secret information violated due process); *see also United States ex rel. Kasel de Pagliera v. Savoretti*, 139 F. Supp. 143 (S. D. Fla. 1956) (holding summary exclusion of returning permanent resident aliens unconstitutional).

The Government's attempt to distinguish *Rafeedie* from the case at bar on the ground that legalization is a benefit is unpersuasive. Reentry is also a benefit—one for which aliens have no constitutional entitlement. *Plasencia*, 459 U.S. at 32, 103 S. Ct. at 329 ("an alien seeking initial admission to the United States requests a privilege").

This limitation of the classified information provision to the exclusion context comports with the requirement that administrative and judicial review of deportation orders be based on "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4); *see Whetstone v. INS*, 561 F.2d 1303, 1306 (9th Cir. 1977) (finding that "[d]eportation on a charge not presented

in the order to show cause, or at the hearing, would offend due process" because record evidence must establish the basis for deportation). Because legalization decisions are reviewable under the deportation review provisions, the statutory scheme does not support use of summary process which relies on secret information as an alternative to regular hearing requirements.

The Government asserts, however, that under case law allowing use of undisclosed information for determinations that are statutorily unreviewable because they are delegated to the Attorney General's sole discretion, it has full statutory authority to use secret information to decide a legalization application. *See Jay v. Boyd*, 351 U.S. 345, 76 S. Ct. 919, 100 L.Ed. 1242 (1956). Interpreting the statutory provision for suspension of deportation, 8 U.S.C. § 1254, the *Jay* Court upheld the use of undisclosed information to inform the Attorney General's decision on the grounds that Congress explicitly delegated the decision to her "unfettered discretion" as "an act of grace." *Id.* at 354, 76 S. Ct. at 924-25. The statutory provision under consideration here, in contrast, requires that "the Attorney General shall adjust" the alien's status if the statutory eligibility requirements are satisfied. See 8 U.S.C. § 1255a(a). Thus, the extension of use of confidential information to mandatory statutory provisions such as the one at issue here is not warranted by the *Jay* rationale.[7]

[7] Our conclusion that the Government wrongly relied on § 1255a provides an additional basis for the district court's subject matter jurisdiction for this due process claim. Because exclusive review applies only to decisions on the record, agency resort to summary process necessarily requires judicial review in the district court pursuant to its general federal question and immigration law jurisdiction. *See Rafeedie*, 880 F.2d at 510-512, 512 (finding that "the generally applicable law of reviewability—that is to say, the [Administrative Procedure Act]—applies and provides for judicial review of such proceedings").

The Government's reliance on *Campos v. INS*, 402 F.2d 758 (9th Cir. 1968), is similarly misplaced. Dictum in that case suggests that an alien applying for legalization under the discretionary statute, 8 U.S.C. § 1255, is "assimilated" to the position of (treated as) an entering alien both in terms of eligibility criteria and in terms of procedural rights. *Id.* at 760. Our later cases, however, have interpreted this "assimilation" rule narrowly, holding that it "refers to the application of eligibility criteria for admission and to differences in burden of proof." *Firestone v. Howerton*, 671 F.2d 317, 320 & 320 n.5 (9th Cir. 1982). Moreover, further assimilation of applicants to the position of an alien at entry would virtually eliminate the primary distinction between aliens at entry and aliens residing within the country. Therefore, although applicants for legalization must satisfy the substantive admissibility requirements, their constitutional rights, including their right to procedural due process, are not correspondingly diminished. Thus, we find that there is no statutory or regulatory basis supporting the Government's interest in use of classified information in legalization decisions pursuant to § 1255a.

c. *The Mathews Balancing Test*

(1) *The Private Interest Affected*

Aliens who have resided for more than a decade in this country, even those whose status is now unlawful because of technical visa violations, have a strong liberty interest in remaining in their homes. *See, e.g., Plasencia*, 459 U.S. at 34, 103 S.Ct. at 330; *Firestone*, 671 F.2d at 321 n.10 (noting that the "equities" of long residence in the country are relevant to legalization). Similarly, the denial of legalization impacts the opportunity of an alien to work, which also raises constitutional concerns. *HRC*, 498 U.S. at 491, 111 S. Ct. at 895. The statute provides an entitlement not subject to denial according to the discretion of the Attorney General, as long as the eligibility requirements are satisfied. 8 U.S.C. § 1255a(a). Thus, the district court did not err in finding that the private interests affected are truly substantial.

(2) *The Risk of Erroneous Deprivation and Value of Safeguards*

There is no direct evidence in the record to show what percentage of decisions utilizing undisclosed classified information result in error; yet, as the district court below stated, "One would be hard pressed to design a procedure more likely to result in erroneous deprivations." *See, e.g., Goss* v. *Lopez*, 419 U.S. 565, 580, 95 S. Ct. 729, 739, 42 L.Ed.2d 725 (1975) (finding that "the risk of error is not at all trivial" in summary discipline in school settings). Without any opportunity for confrontation, there is no adversarial check on the quality of the information on which the

INS relies. *See Knauff*, 338 U.S. at 551, 70 S. Ct. at 316 (Jackson, J., dissenting) ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.") (citation omitted).

Although not all rights of criminal defendants are applicable to the civil context, the procedural due process notice and hearing requirements have "ancient roots" in the rights to confrontation and cross-examination. *Greene* v. *McElroy*, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id.* As judges, we are necessarily wary of one-sided process: "democracy implies respect for the elementary rights of men ... and must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 170, 71 S. Ct. 624, 647-48, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). "It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, in camera submissions." *Abourezk*, 785 F.2d at 1061. Thus, the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error. We conclude that the district court did not err in finding that there is an

exceptionally high risk of erroneous deprivation when undisclosed information is used to determine the merits of the admissibility inquiry.

(3) *The Governmental Interest*

The Government seeks to use undisclosed information to achieve its desired outcome of prohibiting these individuals whom it perceives to be threats to national security from remaining in the United States while protecting its confidential sources involved in the investigation of terrorist organizations. Yet the Government has offered no evidence to demonstrate that these particular aliens threaten the national security of this country. In fact, the Government claims that it need not. It relies on general pronouncements in two State Department publications about the PFLP's involvement in global terrorism and on the President's recent broad Executive Order prohibiting "any United States persons" from transacting business with the PFLP. *See* Exec. Order No. 12947 (January 23, 1995) (finding "that grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States"). We take judicial notice of these government documents on appeal for the limited purpose of assessing the strength of the Government's interest, *see, e.g., Castillo-Villagra v. INS*, 972 F.2d 1017, 1030 (9th Cir. 1992) (noticing a State Department report to assist in determining the plausibility of the petitioner's claim), yet we find these data insufficient to tip the Mathews scale towards the Government. These aliens have been free

since the beginning of this litigation almost eight years ago, without criminal charges being brought against them for their activities. According to the district court, the government's *in camera* submission targets the PFLP: although it indicates that the PFLP advocates prohibited doctrines and that the aliens are members, it does not indicate that either alien has personally advocated those doctrines or has participated in terrorist activities.

If Barakat and Sharif engage in any deportable activities, the government is not precluded from contesting their legalization or from instituting deportation on the basis of non-secret information. If the Government chooses not to reveal its information in order to protect its sources, the only risk it faces is that attendant to tolerance of Barakat's and Sharif's presence so long as they do not engage in deportable activities. Thus, although the Government undoubtedly has a legitimate interest in protecting its confidential investigations, it has not demonstrated a strong interest in this case in accomplishing its goal of protecting its information while prohibiting these aliens' legalization.

The Government's attempt to bolster its interest by relying on permitted uses of undisclosed information is misguided. Although the courts have allowed the Government to keep certain information confidential, the exceptions to full disclosure are narrowly circumscribed. *Abourezk*, 785 F.2d at 1061. For example, a formal claim of a "state secrets privilege" may prevent discovery and shield the use of materials against the Government in tort litigation for damages. *Id.*; *see also United States v. Reynolds*, 345 U.S. 1, 6-7, 73 S. Ct. 528, 531-32, 97 L.Ed. 727 (1953) (in a tort suit against the Government, permitting

nonproduction of an Air Force accident investigation report because of national security concerns); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) (in a constitutional tort suit for damages against officials, allowing the Government to withhold production of wiretap information), *cert. denied*, 465 U.S. 1038, 104 S. Ct. 1316, 79 L.Ed.2d 712 (1984). However, the failure to disclose information prevents its use in the adversary proceeding: the effect of upholding the privilege is "that the evidence is unavailable, as though a witness had died." *Ellsberg*, 709 F.2d at 64. Even in those rare cases when the privilege operates as a complete shield to the government and results in the dismissal of a plaintiff's suit, the information is simply unavailable and may not be used by either side. *Id.*; *In re United States*, 872 F.2d 472 (D.C. Cir.), *cert. dismissed*, 493 U.S. 960, 110 S. Ct. 398, 107 L.Ed.2d 365 (1989); *Molerio v. F.B.I.*, 749 F.2d 815, 820-22 (D.C. Cir. 1984) (dismissing a Title VII complaint). Here, the Government does not seek to shield state information from disclosure in the adjudication of a tort claim against it; instead, it seeks to use secret information as a sword against the aliens.

Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process. We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the

substantial personal interests involved. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944, 103 S. Ct. at 2780. Therefore, we find that the district court did not err in deciding that use of undisclosed classified information under these circumstances violates due process.

3. *Applicability of Permanent Injunction Standards*

Because there is no adequate remedy at law to compensate for denial of legalization based on a constitutional violation, and because the use of secret information about their affiliation with the PFLP irreparably injures Barakat and Sharif by depriving them of a strong liberty interest without due process and, indirectly, by chilling their First Amendment rights of expression and association, we affirm the district court's grant of a permanent injunction against use of undisclosed information to adjudicate Barakat's and Sharif's legalization applications.

CONCLUSION

We find that the district court had subject matter jurisdiction, pursuant to its federal question and general immigration jurisdiction, over each of the claims presented here and that each claim is ripe for review. We affirm the district court's preliminary injunction against the selective enforcement of immigration laws against the Six; we reverse its determination that it lacks jurisdiction to review Hamide's and Shehadeh's selective enforcement claim, and we remand for that review; and we affirm

the court's issuance of a permanent injunction against the use of undisclosed classified information in legalization proceedings pursuant to § 1255a.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Plaintiffs in each case are entitled to their costs against the Government.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-02107 SVW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

[Filed Jan. 7, 1994]

AMENDED ORDER REGARDING HAMIDE AND SHEHADEH

Khader Hamide and Michel Shehadeh have made a motion for reconsideration of this Court's November 19, 1993 order regarding their cases. This Court believes that the holding in the prior order was correct but recognizes that some clarification and corrections are in order because, among other reasons, the Court misdescribed Hamide and Shehadeh's present claims.

THE COURT THEREFORE ORDERS THAT ITS NOVEMBER 19, 1993 ORDER BE VACATED AND

THAT THIS AMENDED ORDER BE ENTERED IN ITS PLACE.

THIS COURT ORDERS THAT SUMMARY JUDGMENT IS GRANTED FOR DEFENDANTS AND THAT DEFENDANT'S REQUEST FOR A PRELIMINARY INJUNCTION IS DENIED.

The Court recognizes that this order reverses holdings that this Court made in its August 1993 order. However, the Court now understands the Government's claims more clearly and has determined that its August 1993 order was incorrect regarding Hamide and Shehadeh's ability to further proceed with their selective prosecution claim.[1]

Discussion

This case concerns the Government's efforts to deport eight Palestinians. All eight are allegedly members or associates of the Popular Front for the Liberation of Palestine ("PFLP"), a Marxist branch of the Liberation of Palestine Liberation Organization ("PLO"). In attempting to deport two of the Palestinians, Khader Hamide and Michel Shehadeh, the Government relies on the statutory provision allowing the deportation of aliens who have engaged in terrorist activity. In attempting to deport the other six aliens (Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, Aiad Khaled Barakat, Naim Nadim Sharif, Amjad Mustafa Obeid) ("Other Six"), the Government relies on non-ideological, non-terror-

[1] The Court recognizes that Hamide and Shehadeh have brought two alternative selective prosecution claims. Since the Court's present analysis is the same under either claim, they will be described jointly throughout this order as the selective prosecution claim.

ism related immigration law provisions such as expired visas. This order applies only to Hamide and Shehadeh. This Court will shortly issue another order covering the Other Six.

Hamide and Shehadeh have alleged that the Government's actions against them constitute selective prosecution. While this Court has substantial concerns regarding the Government's actions regarding Hamide and Shehadeh, the Court holds that the Ninth Circuit's earlier ruling in this case establishes that this Court lacks jurisdiction to enjoin the pending Immigration and Naturalization Service ("INS") proceedings against Hamide and Shehadeh. The Ninth Circuit ruling established that this Court did not have jurisdiction to hear Hamide and Shehadeh's facial or as applied challenge to the constitutionality of their deportation. This Court believes that, given the unusual facts of this dispute, Hamide and Shehadeh's selective prosecution claim is totally subsumed within the merits of their potential facial or as applied challenges. This Court is therefore equally without jurisdiction to hear the selective prosecution claim.

In its response to this Court's Order Listing Questions For Briefing and in the hearing before this Court on September 1, 1993, the Government clarified that it is seeking to deport Hamide and Shehadeh pursuant to the statutory provision for excluding aliens who have engaged in "terrorist activity". 8 U.S.C. § 1182(a)(3)(B)(i). The Government further clarified that it is relying on the portion of the definition of "terrorist activity", 8 U.S.C. § 1182(a)(3)(B)(iii)(III), which includes "providing of any type of material support . . . to any individual

the [alien] knows or has reason to believe has committed or plans to commit a terrorist activity."

While declining this Court's invitation to detail fully the factual allegations against Hamide and Shehadeh, the Government's counsel at the September 1, 1993 hearing stated that the Government's charges against Hamide and Shehadeh would include PFLP fundraising activities, PFLP recruiting, and PFLP publication distribution.

In their selective prosecution claim, Hamide and Shehadeh assert that the Government has chosen to deport them based on activity which is protected by the First Amendment to the United States Constitution. In fact, the purportedly constitutionally protected conduct which Hamide and Shehadeh assert is the true reason for the government's decision to selectively prosecute them is precisely the same activity which the government apparently intends to use as the actual basis for their deportation. As indicated in this Court's earlier rulings, the allegations described by the Government appear to consist entirely of activity protected by the First Amendment. *See, e.g., Citizens Against Rent Control/ Coalition for Fair Housing v. Berkeley*, 102 S. Ct. 434, 437-439, 454 U.S. 290 (1981) (monetary contributions to advocacy group protected by First Amendment); *International Soc. for Krishna Consciousness, Inc v. Lee*, 112 S. Ct. 2701, 2704-2705 (1992) (distribution of literature protected by First Amendment); *United Steelworkers of America v. Bagwell*, 383 F.2d 492, 496 (4th Cir. 1967) (distribution of literature and solication of union membership protected by First Amendment). This Court finds the Government's reliance on this apparently protected

activity troubling, but does not reach the merits of Hamide and Shehadeh's potential constitutional claims. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510-512 (9th Cir. 1991).

Regardless of whether the Government's allegations consist solely of constitutionally protected activity, this Court does not have jurisdiction to hear any of Hamide and Shehadeh's selective prosecution challenge to the Government's conduct. There are only two possible manners in which the deportation hearing will proceed. The Government will either prove only that Hamide and Shehadeh engaged in conduct which is protected by the First Amendment or the Government will prove that Hamide and Shehadeh have provided "material support" to terrorists in a manner which is not protected by the First Amendment. In either case, this Court lacks jurisdiction. In either case, as discussed below, the selective prosecution claim requires the identical analysis required by the potential facial and as applied challenges to the statute.

On the one hand, if the charges against Hamide and Shehadeh consist solely of protected activity, the earlier opinion by the Ninth Circuit in this proceeding establishes that Hamide and Shehadeh must exhaust their administrative remedies before asserting that the Government's conduct is unconstitutional. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510-512 (9th Cir. 1991). If the Government charges them solely with protected activity, the Court of Appeals will have a complete factual record and an official INS interpretation of the statute's meaning with which to

determine whether the statute is unconstitutional either on its face or as applied to Hamide and Shehadeh.[2] Furthermore, if the Government alleges only protected activity, Hamide and Shehadeh's selective prosection claims will be irrelevant because the Ninth Circuit will hold that the statute itself is constitutionally invalid as applied to Hamide and/or Shehadeh.

Hamide and Shehadeh's selective prosecution claim is an anomaly because they are attempting to claim that they are being selected for deportation on the basis of protected activity while it appears, based on the government's description of the government's case, that their prosecution in fact rests on the same alleged activity. Thus, if the allegations only involve protected activity, their selective prosecution claim is unnecessary. The typical selective prosecution claim involves a defendant who faces prosecution based on allegations unrelated to protected activity who claims that the real reason she was selected for prosecution is that she engaged in protected activity. For example, the Other Six plaintiffs in this case claim that the government's reliance on visa time-period violations is a pretext for the government's attempt to punish their disfavored association with the PFLP. A selective prosecution claim is not proper when the allegations of the prosecution involve the same activity which the defendant claims is the constitutionally protected "true reason" for the government's decision to prosecute.

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[2] In the deportation proceedings, the INS will preliminarily determine what the statute's "material support" provision covers. The final interpretation of the statute and the constitutionality of the statute will be resolved by the courts.

On the other hand, if the Government proves that Hamide and Shehadeh have engaged in more than constitutionally protected activity[3], Hamide and Shehadeh do not have a cognizable "selective prosecution" claim. A selective prosecution claim requires the plaintiffs to demonstrate that the Government has chosen to act against them because of constitutionally protected activity. *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir.), *cert. denied*, 113 S. Ct. 290 (1992) (defendant must show that prosecution based on impermissible motive). The Government constitutionally may choose to prosecute some providers of constitutionally unprotected material support without prosecuting others. The Executive Branch has nearly plenary authority to determine which side, if any, the United States supports in foreign disputes. *See United States v. Ramirez*, 765 F.2d 438 (5th Cir. 1985) (rejecting selective prosecution claim) (nothing "invidious" about using Neutrality Act against people supporting Haitian rebels but not against people supporting Cuban rebels), *cert. denied sub nom Perpignand v. United States*, 106 S. Ct. 812 (1986); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (no private right of action under Neutrality Act because such right would restrict prosecutorial discretion in an area where "normal desirability of such discretion is vastly augmented by the broad leeway traditionally accorded the Executive in matters of foreign affairs"); *Goldwater v. Carter*, 100

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[3] An example of unprotected provision of material support would be the provision of "explosives" or "training" to a terrorist. By providing this example, this Court does not in any way suggest that Hamide and Shemadeh have done such things or done anything more than exercise their First Amendment rights.

S. Ct. 533, 444 U.S. 996 (1979) (President has authority to unilaterally terminate terminate treaty with Republic of China (Taiwan) as part of decision to recognize People's Republic of China (Beijing) as sole legal government of China); *United States v. Curtiss-Wright Export Corp.*, 57 S. Ct. 216, 299 U.S. 304 (1936) (President has substantial discretion to act in regard to disputes between foreign nations). The Executive Branch may therefore determine whether the provision of constitutionally unprotected material support will be tolerated in certain circumstances but prosecuted in others. When making such determinations, the Executive Branch is not deciding which side of a foreign dispute a United States resident alien may advocate, only which side may be provided constitutionally unprotected support. Such selectivity does not improperly infringe on the speech and associational activity protected by the First Amendment. *See United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (where speech and non-speech elements are combined in same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom"). If the government demonstrates that Hamide and Shehadeh have provided unprotected material support to a disfavored party to a foreign dispute, Hamide and Shehadeh cannot claim that the "true reason" they are being prosecuted is because of their protected support of that same foreign party. The plaintiffs' analogy to a government decision to selectively prosecute black people for assaults is unpersuasive because in that situation the alleged unlawful activity is unrelated to the constitutionally impermissible basis for the defendant's selection by the government.

THIS COURT THEREFORE FINDS THAT IT LACKS THE JURISDICTION TO HEAR HAMIDE AND SHEHADEH'S SELECTIVE PROSECUTION CHALLENGE.

To ensure that the record before the Ninth Circuit will be complete, this Court hopes that the deportation proceedings will produce detailed findings of fact establishing what specific acts the Government has shown Hamide and Shehadeh to have committed. Such findings will assist the Ninth Circuit in determining whether the Government has shown that Hamide and Shehadeh engaged in anything more that constitutionally protected activity.

IT IS SO ORDERED.

DATED: Jan 5, 1994

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87 2107 SVW (Kx)

AMERICAN ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL., PLAINTIFF

v.

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANT

[Filed Jan. 7, 1994]

ORDER REGARDING DISCOVERY ON SELECTIVE PROSECUTION CLAIM AND GRANTING PRELIMINARY INJUNCTION AGAINST FURTHER DEPORTATION PROCEEDINGS

Plaintiffs Basher Amer, Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, and Naim Sharif are affiliated to some degree with the Popular Front for the Liberation of Palestine ("PFLP"). Plaintiffs allege that the government's decision to bring deportation proceedings against plaintiffs is a selective prosecution based on plaintiffs' support of the PFLP. *See Lennon v. United States*, 387 F. Supp. 561, 564-565 (1975) (selective prosecution challenge may be brought to enjoin deportation proceeding).

I. Elements of a Selective Prosecution Claim

This Court has described the elements of a selective prosecution claim in previous orders, but will repeat some of the Court's rulings in this order for purposes of clarity.

A selective prosecution claim has two elements. Plaintiff must prove:

(1) that others who are similarly situated have not been prosecuted, and

(2) that the prosecution is based on an impermissible motive. *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir.), *cert. denied*, 113 S. Ct. 290 (1992).

Plaintiff must prove both these elements in order to overcome "the presumption that the prosecution was undertaken in good faith and in a nondiscriminatory fashion." *United States v. Christopher*, 700 F.2d 1253, 1259 (9th Cir.), *cert. denied*, 103 S. Ct. 2436, 461 U.S. 960 (1983).

A. Treatment of similarly situated others

1. Meaning of first prong

The parties dispute the meaning of the first prong of the selective prosecution claim. The government contends that this prong requires proof that no similarly situated person has been prosecuted. In contrast, plaintiffs contend that this prong merely requires proof that a similarly situated person has not been prosecuted. This Court's understanding lies somewhere between the extremes advocated by the parties. The first prong has been held to require a showing that "similarly situated persons 'are

generally not prosecuted for the same conduct.'" *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989) (citation omitted), *cert. denied sub nom Socorro Pardo v. United States*, 111 S. Ct. 751, 498 U.S. 1046 (1991). Based on this version of the first prong and the lack of logic in the extremes advocated by the parties, this Court will require plaintiffs to prove that the government does not generally seek to deport similarly situated people.

2. Control group

Analysis of the first prong requires comparing plaintiffs to a "control group" or others who are similarly situated. In *U.S. v. Aguilar*, 883 F.2d at 706, the Ninth Circuit explained how a control group is to be selected.

> The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. . . . The control group and defendant are the same in all relevant respects, except that defendant was, for instance, exercising his first amendment rights. *Id.*

In defining an appropriate control group, the Court must "isolate the factor allegedly subject to the impermissible discrimination so that the similarly situated group is analogous to the defendant without the one impermissible factor. *United States v. Gutierrez*, 990 F.2d 472, 476 (9th Cir. 1993).

> In other words, the control group should consist of people (1) who have broken the same kind of law that plaintiffs are alleged to have broken and

> (2) who have not engaged in the kind of activity which plaintiffs allege resulted in their selection for deportation.

The plaintiffs are alleged to have violated federal immigration law by overstaying their visas, by failing to maintain student status, and by working without authorization.

Plaintiffs allege that they have been selected for deportation because they are associated with the PFLP — a terrorist organization. Plaintiffs further allege that the government generally does not seek to deport individuals whom the government knows to be in violation of non-ideological immigration provisions such as those allegedly violated by plaintiffs. In particular, plaintiffs allege that the government generally does not seek to deport individuals who have committed passive, non-ideological immigration violations and who associate with terrorist organizations that the government supports or condones, such as the Contras, the Mujahadeen, RENAMO, and anti-Castro Cubans.

Given the allegations in this case, this Court has previously stated that the appropriate control group for these plaintiffs is: "individuals whom the government knows to be in violation of non-ideological provisions and who associate with terrorist organizations whose views the government endorses or tolerates."[1]

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[1] The government contends that use of a control group which requires the Court to identify what foreign groups are supported or tolerated by the government and what foreign groups are opposed or not tolerated by the government will inappropriately involve this Court in a non-justiciable political question. The Court rejects this contention. The Court's

Both plaintiffs and defendant have urged the court to modify this control group. Plaintiffs claim that the control group should be individuals whom the government knows to be in violation of non-ideological provisions and who associate with non-PFLP terrorist organizations. The problem with plaintiffs' proposed control group is that it may include associates of other terrorist groups that the government may dislike and against which the government may seek to act by means of deportation. The Court wishes to avoid examining the government's treatment of other arguably disfavored terrorist groups such as the Irish Republican Army, Peru's Shining Path, or Hezbollah. The Court's control group better isolates the factor which plaintiffs allege has resulted in their disfavored treatment, i.e. association with a disfavored terrorist group.

Defendant wants a broader control group allowing evidence of any kind of prosecution against any alien associated with any terrorist group. The Court has previously rejected this proposal and does so again because such a control group would not properly isolate the alleged discrimination. For example, plaintiffs are not arguing that the government does

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decision will not, in any way, constitute an endorsement or a condemnation of any foreign nation or alien group. Relying on public records, this Court can determine that the government has generally supported or at least tolerated the Mujahadeen, the Contras, anti-Castro Cubans and the other groups described by plaintiffs. Given abundant public statements by high government officials regarding every one of these groups, the government cannot reasonably contest that the government has supported or tolerated these groups while the government has generally opposed the PFLP and continues to condemn the PFLP in papers filed in this case.

not act against aliens who commit acts of violence or fraud.

Having considered the arguments of the parties, the Court finds that the appropriate control group is essentially the one previously chosen by the Court. *The relevant evidence for this prong will focus on evidence of whether the government has sought to* ***deport*** *members of* ***"favored" terrorist groups*** *such as the Contras, Mujahadeen, RENAMO, or anti-Castro Cubans for* ***passive, non-ideological immigration violations*** *such as those allegedly committed by plaintiffs.*

Thus, the government's frequent provision of information concerning the government's prosecutions and deportations of aliens committing non-immigration offenses, such as crimes of violence and drug offenses, is irrelevant because such aliens have not broken the same kind of law that plaintiffs are alleged to have broken. Such aliens are outside the control group because they have not committed *immigration* violations of the kind allegedly committed by plaintiffs. Similarly, the government's references to its actions against aliens who have actually committed acts of terrorism are irrelevant because the government has based its deportation claims against plaintiffs solely on allegations of non-violent conduct. Finally, the government's references to aliens who have committed immigration fraud are irrelevant because plaintiffs are not accused of the kind of calculated criminal behavior involved in a fraud claim. Plaintiffs are alleged to have passively violated the law by staying in this country too long and/or by not attending school frequently enough. If the government hopes to defeat plaintiffs' claims, the government must locate examples where members of

the control group were prosecuted for such passive, non-ideological immigration violations.

B. Impermissible motive

Plaintiffs allege that they were chosen for deportation because they are associated with the PFLP. As this Court has previously held, mere association with the PFLP is protected by the First Amendment. The PFLP is not solely a criminal organization. It does more than conduct terrorist operations. Thus, support of the PFLP or association with the PFLP would not be a permissible basis for the government to use in determining whom to prosecute. Plaintiffs allegations of discriminatory purpose or intent state a claim sufficient to satisfy the requirements of the second prong of a selective prosecution claim. *See Gutierrez*, 990 F.2d at 476 (second prong requires proof of discriminatory purpose or intent).

II. The Competing Motions for Summary Judgment

This Court has previously rejected the government's motion for summary judgment. So that there will not be any confusion, the Court wishes to clarify its reasoning. Under Ninth Circuit law, a party alleging selective prosecution is entitled to conduct discovery if the party has introduced evidence establishing a "colorable basis" for both prongs of a selective prosecution claim. *Bourgeois*, 964 F.2d at 938-941; *United States v. Balk*, 706 F.2d 1056, 1060 (9th Cir. 1983). While a "colorable basis" is less demanding than a prima facie case, this Court recognizes that it is a "high threshold" requiring the presentation of specific facts, not merely allegations. *Bourgeois*, 964 F.2d at 939; *United States v. Fares*,

978 F.2d 52, 59 (2d Cir. 1992) ("[m]ere assertions and generalized proffers on information and belief are insufficient"). In this Court's earlier order of August 13, 1983, the Court reviewed the evidence offered by both parties. This evidence establishes a colorable basis for plaintiffs' allegations. Plaintiffs are entitled to further discovery.

The Court also has previously rejected plaintiffs' motion for summary judgment. While plaintiffs have presented substantial evidence on the second prong, i.e. discriminatory motive, plaintiffs have merely presented a colorable claim regarding the allegation that similarly situated others have not been targeted for deportation. The affidavits presented by plaintiffs do not establish a prima facie case. Furthermore, even if the affidavits were sufficient to establish a prima facie case, the government would be entitled to further discovery before this Court could determine that there is not a genuine issue of material fact regarding disparate enforcement. At this time, this Court does not believe that discovery regarding the personal knowledge of plaintiffs' declarants is necessary.

The appropriate source for further and presumably dispositive information regarding the crucial first prong is the records of the Immigration and Naturalization Service. The control group includes members of the Contras, Mujahadeen, RENAMO and anti-Castro Cuban groups. THIS COURT HEREBY ORDERS THE GOVERNMENT TO PRODUCE TO PLAINTIFFS BY FEBRUARY 11, 1994:

(1) ANY RECORDS OF GOVERNMENT DEPORTATION ACTIONS DURING 1986 TO 1993 FOR NON-IDEOLOGICAL, PASSIVE VIOLA-

TIONS OF THE IMMIGRATION LAWS AGAINST ANY PERSON THAT THE GOVERNMENT KNEW WAS A MEMBER OF ANY OF THESE GROUPS.

(2) SUMMARY INFORMATION WITH APPROPRIATE SUPPORTING DECLARATIONS ESTABLISHING THE NUMBER OF PEOPLE IN EACH GROUP WHO MEET THE CONTROL GROUP DEFINITION OF INDIVIDUALS WHO HAVE COMMITTED PASSIVE, NON-IDEOLOGICAL VIOLATIONS OF THE IMMIGRATION LAWS AND WITH REGARD TO WHOM THE GOVERNMENT WAS AWARE (E.G., THROUGH APPLICATIONS FOR ASYLUM OR LEGALIZATION) OF THEIR SUPPORT OF OR AFFILIATION WITH TERRORIST GROUPS WITHIN THE CONTROL GROUP.

IN PRODUCING THESE RECORDS, THE GOVERNMENT MAY REDACT INFORMATION WHICH WOULD VIOLATE THE PRIVACY RIGHTS OF ANY PARTICULAR INDIVIDUAL AND WHICH WOULD NOT SERVE TO ASSIST THE COURT IN DETERMINING WHETHER THE CONTROL GROUP HAS BEEN TREATED DIFFERENTLY FROM THE PLAINTIFFS. FOR EXAMPLE, NAMES MAY BE REDACTED FROM THE INFORMATION IN CATEGORY ONE. THE GOVERNMENT, HOWEVER, MUST PROVIDE SUFFICIENT INFORMATION FOR PLAINTIFFS TO ESTABLISH EACH INDIVIDUAL'S NATION OF ORIGIN, GROUP AFFILIATION, ALLEGED IMMIGRATION VIOLATION AND DISPOSITION OF THEIR PROCEEDINGS.

After receiving this information, if plaintiffs still believe they can show disparate impact, PLAINTIFFS SHOULD FILE A MOTION FOR SUMMARY JUDGMENT ON THE DISPARATE IMPACT PRONG BY FEBRUARY 25, 1994. THE GOVERNMENT SHOULD FILE ITS OPPOSITION AND/OR ITS COMPETING MOTION FOR SUMMARY JUDGMENT BY MARCH 11, 1994. ANY REPLY PAPERS SHOULD BE FILED BY MARCH 18, 1994. THE PARTIES SHOULD NOTE THAT THIS JUDGE'S LOCAL RULES REQUIRE THAT PLEADINGS BE OF 25 PAGES OR LESS. THIS COURT WILL CONDUCT A HEARING ON SUCH MOTIONS ON MARCH 28, 1994.

ALTERNATIVELY, IF THE INFORMATION PROVIDED BY THE GOVERNMENT DOES NOT SUFFICIENTLY RESOLVE *THE DISCRIMINATORY IMPACT PRONG*, THEN PLAINTIFFS SHOULD FILE A MOTION WITH THIS COURT BY FEBRUARY 25, 1994. SUCH A MOTION SHOULD DESCRIBE IN DETAIL ANY INSUFFICIENCIES IN THE GOVERNMENT'S PRODUCTION AND THE REASONS WHY PARTICULAR ADDITIONAL DISCOVERY METHODS ARE NECESSARY. IF THIS ALTERNATIVE MOTION IS FILED, THE REMAINDER OF THE SCHEDULE FOR OPPOSITION AND REPLY WILL BE THE SAME AS ABOVE DESCRIBED FOR A MOTION FOR SUMMARY JUDGMENT.

Pending these motions, the Court will stay further discovery on the improper motive prong. *Cf. Bourgeois*, 964 F.2d at 941 (noting that evidence of unusualness of prosecution may also support finding of discriminatory motive).

III. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs have also moved for a preliminary injunction. This Court now feels that it is appropriate to rule on this motion. The Ninth Circuit standard for assessing motions for preliminary injunctions is found in *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173 (9th Cir. 1989). The party requesting the preliminary injunction must show (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) serious questions going to the merits and a balance of hardships tipping sharply in the party's favor. *Id.* at 1174. This test is viewed as establishing a continuum of fact and legal patterns between the two stated possibilities. *Id.*

Preliminary analysis of the merits

Given the evidence discussed in its August 13, 1993 order, this Court believes that plaintiffs have shown a likelihood of success on the merits on the issue of discriminatory motive. The weaker evidence on discriminatory impact, however, does not establish a likelihood of success on the merits. On the other hand, the proffered evidence does make a colorable claim and does raise serious questions going to the merits of the disparate impact prong.

Injury or hardship

The balance of hardships tilts sharply in favor of plaintiffs.[2] If deportation proceedings continue un-

[2] This Court recognizes that the Ninth Circuit has held that the hardships of the deportations process do not justify these plaintiffs in bringing an otherwise unripe challenge to the constitutionality of their deportation. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510-512 (9th Cir. 1991). However, the hardship analysis of the Ninth Circuit addressed the issue of whether an otherwise unripe constitutional challenge was ripened based on the potential hardship for the plaintiffs. The present issue is ripe and this Court must now address a different hardship issue, i.e. what hardships will the parties suffer in the event that the injunction is issued and what hardships will the parties suffer in the event that the injunction is not issued.

enjoined, plaintiffs face the strain of deportation hearings with all the possible consequences of adverse determinations, including the potential loss of privilege to work in this country. Plaintiffs also face the hardship and chilling effect of being subject to an allegedly bad-faith prosecution brought in retaliation for First Amendment activity. *See Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir.) (irreparable harm established if party shows prosecution brought in retaliation for exercise of constitutional rights), *cert. denied*, 101 S. Ct. 3051, 452 U.S. 916 (1981); *PHE, Inc. v. United States Dept. of Justice*, 743 F. Supp. 15, 25 (D.D.C. 1990) (injunction justified by showing that prosecution brought in retaliation for exercise of constitutional rights). On the other hand, if an injunction is issued pending final resolution of plaintiffs' claims, the government's only loss is a potentially unnecessary delay in the deportation of six people who have overstayed their visas. The government has not alleged or shown that plaintiffs continued presence in this country poses any other particular danger. The government's stated dislike of the PFLP does not constitute a hardship.

Upon consideration of the arguments and evidence offered in support of and in opposition to plaintiffs' motion and upon consideration of the entire record in this proceeding, plaintiffs have shown at least a serious question going to the merits on each prong of

their claim and have shown a likelihood of success on the merits on the discriminatory motive prong, and plaintiffs have shown that the balance of hardships tilts heavily in plaintiffs' favor. Plaintiffs have justified a preliminary injunction under *Johnson Controls, Inc.*

THIS COURT HEREBY ORDERS THAT DEFENDANT IS PRELIMINARILY ENJOINED FROM CONDUCTING FURTHER DEPORTATION PROCEEDINGS AGAINST PLAINTIFFS.

IT IS SO ORDERED.

DATED: January 5, 1994

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87 2107 SVW (Kx)

AMERICAN ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL., PLAINTIFF

v.

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANT

[Filed Jan. 7, 1994]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION REGARDING CONFIDENTIAL INFORMATION AND ORDERING FURTHER DISCOVERY

Plaintiffs Barakat and Sharif applied for legalization under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a. The mechanics of the application process were described in detail in this Court's order filed August 13, 1993.

Barakat and Sharif contend that the government has violated their procedural due process rights in using classified information—which was not made available to Barakat and Sharif—in the consideration of their applications. In response to their applica-

tions, the INS issued Notices of Intent to Deny which stated that the INS had reviewed classified information which indicated that Barakat and Sharif were members of the PFLP and therefore ineligible for temporary resident status—the first step in the legalization process. It is the Court's understanding that the next step in the application process will be for the INS to hold a hearing giving Barakat and Sharif an opportunity to rebut the government's allegations of PFLP membership. At that hearing the Government contends that it does not need to make the classified information supporting the allegations available to the plaintiffs.[1]

Barakat and Sharif have moved for a preliminary injunction enjoining the INS from using confidential information in adjudicating their IRCA applications.[2] This Court has previously ruled that it has jurisdiction to address plaintiffs' claims and that plaintiffs' claims are justiciable because this Court holds that plaintiffs' claims more closely resemble the procedural due process claims presented in *McNary v. Haitian Refugee Ctr., Inc.*, 111 S. Ct. 888, 892, 894, 498 U.S. 479 (1991) than the statutory interpretation challenges in *Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485, 2490, 2491, 2497 (1993).[3] The Supreme

[1] Contrary to the government's contention, this factual background establishes that Barakat and Sharif have felt "in a concrete way" the administrative decision to use classified information. Barakat and Sharif's claims are ripe.

[2] No party has moved for summary judgment on the merits regarding the constitutionality of the contested secret procedures.

[3] Like the *McNary* plaintiffs and unlike the *Catholic Social Services* plaintiffs, Barakat and Sharif are contesting the procedures being used to assess their applications not "regulations specifying limits to eligibility." *See Reno v. Catholic Social Services*, 113 S. Ct. at 2497.

Court's holding in *McNary* applies equally well to Barakat and Sharif's due process claims.

> Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in § 210(e) is not contemplated by the language of that provision. *McNary*, 111 S. Ct. at 896-897.

This Court continues to believe that plaintiffs raising procedural claims requiring fact-finding and record-developing may raise their claims in federal district court. The Court continues to believe that Barakat and Sharif are raising just such claims. *See Rafeedie v. INS*, 880 F.2d 506, 526, 524-525 (D.C. Cir. 1989) (procedural due process challenge to use of classified information in immigration decision requires development of factual records by district court in situation where relevant facts will not be developed in INS proceedings).

This Court must now consider the merits of the claims that the procedural due process rights of Barakat and Sharif have been and will be violated by the government's use of classified information—that plaintiffs have not seen and will not be allowed to see—in the adjudication of plaintiffs' applications for legalization.

The Court has previously stated that it intends to apply the *Matthews v. Eldridge*, 96 S. Ct. 893, 903, 424 U.S. 319 (1976), test to determine the procedural fairness of allowing the government to use

classified information in evaluating plaintiffs' applications while not allowing plaintiffs the opportunity to see the classified information. *See Landon v. Plasencia*, 103 S. Ct. 321, 330, 459 U.S. 21 (1982) (applying *Matthews v. Eldridge* to immigration procedures). *Matthews v. Eldridge* provides three factors for determining whether an administrative procedure satisfies due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

Given the facts of this dispute, this Court holds that the relevant considerations include:

> (1) the importance to the plaintiffs of their immigration applications;
>
> (2) the risk that the plaintiffs will be erroneously deprived of temporary resident or other legalized status because they cannot confront the evidence against them, together with the likelihood that allowing access to the classified information (or perhaps some proxy of the classified information) will reduce the risk of an erroneous determination of their applications; and
>
> (3) the government's interest in keeping certain information confidential because of national security concerns.

As the D.C. Circuit has explained, "[T]hese questions are to be asked not merely with reference to a single case, but having in mind the type of case it is, with regard to the run of such cases." *Rafeedie v. INS*, 880 F.2d at 524.

Plaintiffs have moved for a preliminary injunction enjoining the use of the classified information in the adjudication of their applications.

Preliminary injunction

Although it has previously declined to rule on the motion for a preliminary injunction, the Court now believes that it has sufficient information to rule on the motion. The Court has given the parties a number of opportunities to supplement the record for the motion. The government has informed the Court that it does not believe that any further development of the record is necessary. The government, however, has not responded to the Court's question regarding the statutory or regulatory authority for considering PFLP membership in denying temporary resident status. Similarly, the government has chosen not to offer even an *in camera* description of the specific factual allegations against Barakat or Sharif or of the nature of the confidential source providing the information upon which the government has relied.

The Ninth Circuit standard for assessing motions for preliminary injunctions is found in *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173 (9th Cir. 1989). The party requesting the preliminary injunction must show (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) serious questions going to the merits and a balance of hardships tipping sharply in the party's favor. *Id.* at 1174. This test is viewed as

establishing a continuum of fact and legal patterns between the two stated possibilities. *Id.*

Preliminary analysis of the merits

The merits question requires consideration of the *Matthews v. Eldridge* factors in light of two sets of cases. In the first set of cases, courts, including the Supreme Court, have held that the INS may use classified information without disclosing it to applicants seeking discretionary relief. *Jay v. Boyd*, 76 S. Ct. 919, 927-928, 351 U.S. 345 (1956) (emphasizing "gratuitous" nature of relief sought, i.e. suspension of deportation); *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985) (per curiam) (*Jay* precludes petitioner seeking discretionary relief from deportation from claiming that consideration of classified material violates due process rights) (noting in dicta that, if not for *Jay*, petitioner's argument would have substantial appeal as a matter of fairness and logic).

The Court holds that *Jay* is binding only on parties seeking discretionary relief.[4] *Naji v. Nelson*, 113 F.R.D. 548, 551-552 (N.D. Ill. 1986) (*Jay* distinguished as applying only to discretionary matters) (discovery authorized regarding propriety of government's use of confidential information in adjudicating Naji's rights to statutory benefits); *Rafeedie v. INS*, 688 F.Supp. 729, 750 n.50 (D.D.C. 1988) (*Jay* limited to situations where party seeking discretionary relief), *aff'd in relevant part*, 880 F.2d 506, 519 (D.C. Cir. 1989) (affirming preliminary injunction); *see United*

[4] The Court also notes that the basis for the Supreme Court's analysis in *Jay* has been seriously questioned. *See Jean v. Nelson*, 105 S. Ct. 2992, 2998, 3008 n.9, 472 U.S. 846 (1985) (Marshall, J., dissenting) (noting critical commentary on Cold War decisions forming basis for *Jay*).

States ex rel. Barbour v. District Director of INS, 491 F.2d 573, 578 (5th Cir.) (*Jay* authorizes use of confidential information in discretionary immigration proceedings, such as release on bail), *cert. denied*, 95 S. Ct. 135, 419 U.S. 873 (1974).

The second set of cases relate to the *Rafeedie* litigation in the District of Columbia. *Rafeedie v. INS* ("*Rafeedie I*"), 688 F. Supp. 729 (D.D.C. 1988); *Rafeedie v. INS* ("*Rafeedie II*"), 880 F.2d 506 (D.C. Cir. 1989); *Rafeedie v. INS* ("*Rafeedie III*"), 795 F. Supp. 13 (D.D.C. 1992). In this series of case, the District Court and the Court of Appeals for the District of Columbia have considered the INS's use of confidential information in exclusion proceedings against a permanent resident alien whom the government alleged was a member of the PFLP. In *Rafeedie I*, the district court granted a preliminary injunction against the INS's use of a summary exclusion proceeding including the use of undisclosed confidential information. In *Rafeedie II*, the D.C. Circuit affirmed the preliminary injunction and held that the *Matthews v. Eldridge* test applied to the Government's regulation allowing confidential information to be used. 880 F.2d at 519, 524. In *Rafeedie III*, the district court applied the *Matthews v. Eldridge* test and determined that to the extent that the government had already used confidential information against Rafeedie, Rafeedie's due process rights had been violated. 795 F.Supp. at 18-20. On the other hand, the District Court concluded that it could not invalidate the regulation authorizing the use of the summary proceeding because the government might voluntarily provide a more extensive hearing. 795 F. Supp. at 20-21.

In light of these two sets of cases and the facts of the present case, this Court now examines the *Matthews v. Eldridge* factors.

The first factor tilts heavily toward plaintiffs. While this Court recognizes the government's interest in controlling immigration, plaintiffs' asserted right to temporary resident status and legalization under IRCA is of tremendous importance both to these plaintiffs particularly, because the government claims that they are otherwise deportable, and to other applicants for legalization generally. *See Landon v. Plasencia*, 103 S. Ct. at 330 (applicant's interest is "weighty" because she "stands to lose the right 'to stay and live and work in this land of freedom'"). Furthermore, their asserted right is based on IRCA's statutory establishment of naturalization eligibility for certain aliens. It is not a discretionary benefit like that sought in *Jay v. Boyd*.

The second factor also favors plaintiffs. As noted in *Rafeedie III*, the confidential information might turn out to be erroneous and, if it is, plaintiffs will have a substantially better chance to explain the error if they know the specific allegations and the source of those allegations. 795 F. Supp. at 19; 688 F. Supp. at 749-750. Furthermore, not only do Barakat and Sharif not know the specific allegations, the government has not even informed them what statute or regulation supposedly gives relevancy to the allegations.

The third factor, however, favors defendant. The government's interest in national security certainly justifies preventing certain dangerous aliens from being naturalized under IRCA. National security also justifies protection of the type of confidential informants who assist the government in monitoring groups of dangerous aliens and who presumably

provided the basis for the allegations against the plaintiffs. However, the government has not provided any information regarding the confidential source supporting the allegations against Barakat and Sharif nor any information regarding any consequences that will result for that source if the allegations are made known to Barakat and Sharif. Additionally, the government has presented little or no evidence to this Court to indicate that these particular defendants—who have been in the United States for several years—are dangerous.

While this Court believes that the issue is close, the Court finds that an additional factor favoring the plaintiffs is history. Traditionally, over the past few decades, the INS has relied upon confidential information only in making discretionary decisions. The INS, until recently, has not relied on confidential information in adjudicating non-discretionary claims such as those of Barakat and Sharif. The INS has not presented any evidence showing why these new procedures are necessary. *See Rafeedie II*, 800 F. 2d at 523 (government points to no special effect in following traditional practices).

Balancing all the factors, this Court finds that Barakat and Sharif have shown that they will probably prevail on the merits of the *Matthews* test. In the language of preliminary injunction analysis, they have shown a likelihood of success on the merits.

The court notes *arguendo* that this balancing test might yield a different result if the government had offered evidence, even *in camera*, indicating that Barakat and Sharif posed a substantial national security threat and indicating that the confidential source making the allegations against plaintiffs was of substantial importance to the government's

intelligence gathering operations and indicating that the confidential source would be compromised or endangered if the specific allegations were made available to Barakat and Sharif.

Injury or hardship

Based on this Court's determination that plaintiffs have shown a likelihood of success on the merits, plaintiffs are entitled to a preliminary injunction if they can show either a possibility of irreparable injury or a balance of hardships strongly favoring plaintiffs.

The plaintiffs face serious consequences if the government is allowed to use the confidential information in the allegedly improper manner. Absent the confidential information, the government apparently does not contest plaintiffs' eligibility for temporary resident status. Denial of the right to temporary resident status will leave the plaintiffs in danger of deportation based on alleged visa overstays. *See Rafeedie II*, 880 F. 2d at 518, 519, 522 (hardship from potential loss in INS proceedings). Furthermore, plaintiffs may reasonably complain that their First Amendment activities as PFLP supporters are being chilled by their fear that these activities will be used against them either directly or in some distorted form when the government confidentially considers classified information in adjudicating their applications. *Rafeedie II*, 880 F.2d at 517. This Court therefore finds that plaintiffs have shown a possibility of irreparable injury and, alternatively, a balance of hardships sharply favoring plaintiffs.

Plaintiffs have therefore satisfied the requirements for a preliminary injunction.

THIS COURT HEREBY GRANTS PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION ENJOINING THE GOVERNMENT FROM USING CLASSIFIED INFORMATION IN CONSIDERING AND ADJUDICATING THE APPLICATIONS OF BARAKAT AND SHARIF UNLESS THE GOVERNMENT PROVIDES BARAKAT AND SHARIF WITH THAT INFORMATION.

As noted above, the preliminary injunction analysis might have had a different result if the government had offered more detailed information concerning the allegations against Barakat and Sharif and concerning the nature of the confidential source and concerning the consequences for the confidential source if the allegations were revealed to plaintiffs. The Court notes that as this case proceeds to final resolution, the government will almost certainly have to present such information. If the government offers such information, this Court would consider a motion to vacate the preliminary injunction.

Discovery issues

The Court notes that neither the government nor the plaintiffs have moved for summary judgment regarding the constitutionality of the provisions allowing the use of secret information. However, in order to facilitate such a motion, this Court will resolve the pending discovery disputes.

Plaintiffs will presumably be bringing (and defendant opposing) a motion for summary judgment seeking a declaration that the regulation authorizing the use of confidential information without disclosure is unconstitutional—both as applied and prospectively—as a violation of plaintiffs' due process rights.

Further factual development is necessary to determine whether there are any disputed issues of fact relevant to a final application of the *Matthews v. Eldridge* factors. On August 13, 1993, this Court issued an order asking, among other things, for the parties to describe any discovery which they thought would be necessary for an adequate assessment of the application of *Matthews v. Eldridge*.

The government stated that it did not believe that any further factual development was necessary.[5]

Plaintiffs, on the other hand, have requested some discovery. Plaintiffs want the government to provide information regarding the reason that INS regulations were modified to allow the use of confidential information in non-discretionary proceedings. Plaintiffs want the INS to provide information on the methods used at INS hearings before the regulations were modified to allow confidential information.

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[5] The government also stated that it did not understand how the INS could approve the plaintiffs' applications given the INS's knowledge of the classified information allegedly making Barakat and Sharif ineligible for approval and the INS did not see how it could disclose that information to Barakat and Sharif without violating federal law prohibiting the disclosure of such information. This is not the "distinct quandary" described by the INS. If this Court finds that the information cannot be used without its disclosure to Barakat and Sharif then the INS may adjudicate the applications without disclosing the information to Barakat and Sharif by not considering the information in adjudicating the applications. The Court reminds the INS that this is apparently what the INS historically did before the current provisions were enacted enabling the INS to consider classified information in non-discretionary adjudications. Since the INS is able to apply the law governing plaintiffs' applications without considering the disputed information, their is no quandary.

Plaintiffs want information on the nature of the security risks which the government alleges Barakat and Sharif create.

The Court does not feel that most of this discovery is necessary. The historical record of immigration procedures is available to both parties. Additionally, the Court anticipates that the INS's concerns in allowing confidential information will be generic concerns with terrorism and national security and that a detailed factual development of the reasons for the new policy will not be productive.

While this Court will not—at this time—require the government to detail the confidential allegations against Barakat and Sharif, this Court does require the government to provide this Court with an *in camera* declaration describing in detail the nature of the allegations against Barakat and Sharif and the nature of the national security interests that would be endangered by providing the confidential information to Barakat and Sharif. The government's declaration should describe the allegations in sufficient detail to allow this Court to understand the types and frequency of the alleged misconduct. The government's declaration should describe the source of the information in sufficient detail to allow this Court to determine the magnitude of the asserted national security interest involved in a potential exposure of that source.

Given its reading of *Matthews v. Eldridge*, the Court believes that some further discovery would be useful. The Court orders that the government should provide the following discovery to plaintiffs:

1) The government should notify plaintiffs whether there is any possibility that the government will allow plaintiffs access at their immigration hearings

to the confidential information forming the basis for the allegations against plaintiffs. *See Rafeedie III*, 795 F. Supp. at 20-21 (court noting possibility that INS will provide procedural protections not required by statute).

2) The government should notify plaintiffs of any consequences which will attach if their applications for temporary resident status are ultimately given a final denial, e.g. deportation status and right to work and to live free of custody while litigation proceeding.

3) The government should notify the plaintiffs of any other occasions in which the government has relied on confidential information in adjudicating IRCA applications. If there have been other such occasions, the government should provide the plaintiffs with summaries of each occasion describing the type of application/proceeding and the general nature of the confidential information.

4) Finally, this Court, in its August 1993 order, mentioned the need for the government to clarify the statutory or regulatory authority for considering PFLP membership or any other alleged misconduct in evaluating an application for temporary resident status under IRCA. While the filings in this case are voluminous, the Court does not believe that the government has answered the Court's question. The Court needs to know what statutes or regulations are being applied to Barakat and Sharif in order fully to assess the merits of their due process claim. Therefore, the Court hereby orders the government to notify this Court and plaintiffs Barakat and Sharif of the statutory or regulatory authority for considering PFLP membership or the allegations described in the confidential information in evaluating the IRCA applications of Barakat and Sharif.

THE COURT HEREBY ORDERS THE GOVERNMENT TO PROVIDE THIS DISCOVERY BY FEBRUARY 18, 1994.

A motion for summary judgment should focus on the need to develop a factual record for the procedural fairness of allowing confidential information in IRCA application proceedings in general and in the cases of Barakat and Sharif in general. The briefs should also inform the Court of other settings where the use of confidential information has been found constitutionally permissible or impermissible, particularly in situations involving non-discretionary adjudications. The briefs should also address the issue raised in *Rafeedie III* about the differing standards for addressing "as applied" and facial due process challenges to immigration procedures. *See* 795 F. Supp. at 18-21.

Once a motion for summary judgment is made, the Court will determine whether there are any disputed issues of material fact justifying an evidentiary hearing.

IT IS SO ORDERED.

DATED: January 5, 1994

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

No. 89-55358

AMERICAN ARAB ANTI-DISCRIMINATION COMMITTEE, ARABAMERICAN DEMOCRATIC FEDERATION, ASSOCIATION OF ARABAMERICAN UNIVERSITY GRADUATES, IRISH NATIONAL CAUCUS, ET AL., PLAINTIFFS-APPELLEES

v.

RICHARD THORNBURGH,[*] ATTORNEY GENERAL; ALAN C. NELSON, COMMISSIONER, INS, HAROLD EZELL; ERNEST E. GUSTAFSON, DISTRICT DIRECTOR, U.S. IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

Argued and Submitted Aug. 10, 1990
Decided July 26, 1991

As Amended on Denial of Rehearing
and Rehearing En Banc July 20, 1992

Before: POOLE and THOMPSON, Circuit Judges, and PRO, District Judge.[**]

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[*] Richard Thornburgh has been substituted for Edwin Meese III, Fed. R. App. P. 43(c).

[**] Honorable Philip M. Pro, United States District Judge, District of Nevada, sitting by designation

POOLE, Circuit Judge:

The government appeals from the district court's declaratory judgment that sections 241(a)(6)(D), (F)(iii), (G)(v), and (H) of the McCarran-Walter Act of 1952, codified in 8 U.S.C. §§ 1251(a)(6)(D), (F)(iii), (G)(v), and (H) (the Act), are unconstitutionally overbroad in violation of the first amendment.[1] We affirm

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[1] In relevant part, section 1251 provides:

(a) Any alien in the United States . . . shall, upon order of the Attorney General, be deported who—

* * * * * *

(6) is or at any time has been, after entry, a member of the following classes of aliens:

* * * * * *

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

* * * * * *

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches

. . . (iii) the unlawful damage, injury, or destruction of property; . . .

in part, reverse in part, vacate the judgment and remand for proceedings not inconsistent with this opinion.

FACTS

In January 1987, the Immigration and Naturalization Service ("INS") detained plaintiffs-appellees (individual appellees), Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, Aiad Khaled Barakat, Naim Nadim Sharif, and Amjad Mustafa Obeid, all non-immigrant aliens, for routine status, non-ideological violations under 8 U.S.C. §§ 1251(a)(2) and 1251(a)(9), and for violations of section 1251(a)(6) because of their membership in the Popular Front for the Liberation of Palestine (PFLP). PFLP is an organization which the government alleges advocates and teaches the "international and governmental

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(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision.

doctrines of world communism," as recited in Section 1251(a)(6)(D). Specifically, the INS alleged that the individual appellees violated Sections 1251(a)(6)(D), (G)(v), and (H). In January 1987, the INS also began deportation proceedings against Khader Musa Hamide and Michel Ibrahim Shehadeh, permanent resident aliens, for their membership in the PFLP, alleging violations of sections 1251(a)(6)(D), (G)(v), and (H). On April 23, 1987, four days prior to the hearing set in this case by the district judge to consider plaintiffs' request for a preliminary injunction, the INS dropped its section 1251(a)(6) charges against the individual appellees, but retained the non-ideological charges.[2] The INS also changed the charges against Hamide and Shehadeh, alleging that they had violated Section 1251(a)(6)(F)(iii).[3]

PROCEDURAL HISTORY

On April 3, 1987, the individual appellees, joined by various organizations, including the American-Arab

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[2] During the pendency of this appeal, the INS initiated deportation proceedings against the individual appellees under the non-ideological charges. Bashar Amer was found not deportable. The INS has appealed this decision to the Board of Immigration Appeals ("BIA"). Amjad Obeid and Ayman Obeid were found deportable; however, no final order of deportation has been entered in any of these proceedings. Amjad Obeid has applied for suspension of deportation pursuant to 8 U.S.C. § 1254(a), and Ayman Obeid has applied for adjustment of status pursuant to 8 U.S.C. § 1255(a). Both applications are pending review by the INS. The deportation proceedings of the remaining individual appellees remain closed pending review of their amnesty applications under 8 U.S.C. § 1255a.

[3] The deportation proceedings brought against Hamide and Shehadeh for violation of Section 1251(a)(6)(F)(iii) were closed pending resolution of this appeal.

Anti-Discrimination Committee (American-Arab), and Hamide and Shehadeh, filed this complaint in the District Court for the Central District of California claiming that section 1251(a)(6)(D) violated the first and fifth amendments, that the government engaged in selective prosecution in violation of the first and fifth amendments, and that the INS procedures could not provide them with a fair and impartial hearing. They sought declaratory and injunctive relief. On May 12, 1987, the complaint was amended to include first and fifth amendment challenges to sections 1251(a)(6)(D), (F)(iii), (G)(v), and (H), and to include the claim that government misconduct deprived plaintiffs of due process. On May 21, 1987, the district judge dismissed Hamide's and Shehadeh's claims as to Sections 1251(a)(6)(F)(iii) for lack of jurisdiction and stayed the other claims pending a ruling by this court on the petition for writ of mandamus. Hamide and Shehadeh's petition for writ of mandamus was denied by order of this court on February 24, 1988. *Hamide* v. *United States District Court for the Central District of California*, No. 87-7249.

On June 15, 1988, plaintiffs filed a second amended complaint which retained their first and fifth amendment challenges but added a challenge to the Foreign Relations Authorization Act, (FRAA) Fiscal Years 1988 and 1989, Pub.L. No. 100-204, § 901, 101 Stat. 1331, 1399 (1987) (amended October 1, 1988). In a published memorandum opinion and order, *American-Arab Anti-Discrimination Committee* v. *Meese*, 714 F. Supp. 1060, 1084 (C.D. Cal. 1989), the district judge concluded that the challenged provisions of the McCarran-Walter Act were substantially overbroad in violation of the first amendment. The court accordingly granted plaintiffs' motion for summary judgment and request for declaratory relief. However, believing that declaratory relief provided an adequate remedy at law, the district court denied injunctive relief. *Id.* at 1063. The district court also held that, given this relief, there was no need to address the challenge to the constitutionality of the FRAA. *Id.* On January 26, 1989, the district court directed entry of final judgment pursuant to Fed. R. Civ. P. 54(b). The district court retains jurisdiction over appellees' remaining claims. We have jurisdiction over final orders pursuant to 28 U.S.C. § 1291.

THE DISTRICT COURT'S RULING

In his memorandum opinion and order, the trial judge first considered whether the individual and organizational plaintiffs had standing. *Id.* at 1064-74. He determined that he was without jurisdiction to hear the constitutional challenges of Hamide and Shehadeh. *Id.* at 1064. They do not appeal this determination. The court held that the other individual appellees had standing because, although they were not presently charged under the challenged provisions of the McCarran-Walter Act, they had shown that they were in jeopardy of being so charged in the future. The court held that the government's continuing belief that the individual appellees belonged to a world-wide "communist" organization, the government's unwillingness to disavow any intent to bring the same charges against the individual appellees, the fact that the government's current manifestation of its willingness to use similar McCarran-Walter Act provisions against Hamide and Shehadeh on account of their membership in the PFLP, and the individual appellees' expressed intent to continue to engage in

the conduct for which they were originally charged, all supported the finding of their standing. *Id.* at 1064-71. The court dismissed all the organizational plaintiffs except American-Arab. *Id.* at 1071-72. The dismissed organizations do not appeal.

On the merits, the court determined that aliens are entitled to the same degree of first amendment protections as are citizens. *Id.* at 1082. Therefore, applying the test articulated in *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969), the court held that the challenged statutory provisions were substantially overbroad under the first amendment because they penalized both protected and unprotected speech. 714 F. Supp. at 1082-84.

DISCUSSION

We agree with the district court that the individual appellees have standing. We nevertheless determine that the district court should have stayed its exercise of jurisdiction because, in our view, the first amendment issues tendered by appellees are not ripe for review. We therefore vacate the district court's order as to the substantive issues. We reverse the declaratory judgment, and we remand the case to the district court for further proceedings not inconsistent with this opinion.

I. *Justiciability—Standing*

The government argues that appellees' claims are not justiciable because they do not have standing. We review *de novo* the district court's determination that the individual appellees and American-Arab do have standing, *Polykoff* v. *Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987), while the underlying factual determinations are reviewed under the clearly erroneous standard. *Id.*

A. Standing and the Individual Appellees

Under Article III of the Constitution, it is a jurisdictional prerequisite that plaintiffs present an actual "case or controversy". *Allen* v. *Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *San Francisco County Democratic Central Comm.* v. *Eu*, 826 F.2d 814, 821 (9th Cir. 1987), *aff'd* 489 U.S. 214, 109 S. Ct. 1013, 103 L.Ed.2d 271 (1989). To satisfy this requirement plaintiffs must show, *inter alia*, that they have standing. Thus, plaintiffs must demonstrate:

> "at an irreducible minimum . . . 'that [they] personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 [99 S. Ct. 1601, 1607, 60 L.Ed.2d 66] (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S. Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976)." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L.Ed.2d 700 (1982).

The essence of the government's standing argument with respect to the individual appellees is that they cannot show an immediate threat of harm. The government argues that, although once charged with the challenged provisions, the individual appellees are not now so charged. The government additionally

argues that there is no imminent likelihood that they will again be charged under the challenged provisions. It notes that the only pending proceedings against the individual appellees are for routine status violations and that "the [INS] has little or no incentive to reinstate the 'world communism' charges or to bring other charges under the non-routine provisions at issue here." Government's Opening Brief at 22. The threats to the individual appellees are therefore very attenuated because their injuries are unlikely to occur unless the government fails to sustain its routine violation charges and again institutes charges under the challenged provisions. The government analogizes this case to *Golden* v. *Zwickler*, 394 U.S. 103, 109, 89 S. Ct. 956, 961, 22 L.Ed.2d 113 (1969). Finally, citing *Laird* v. *Tatum*, 408 U.S. 1, 12-15, 92 S. Ct. 2318, 2325-27, 33 L.Ed.2d 154 (1972), and *Younger* v. *Harris*, 401 U.S. 37, 41, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971), the government avers that it is pursuing non-controversial administrative procedures and the mere fact that it has not forsworn use of the challenged provisions does not confer standing upon the individual appellees. Instead, it argues this court should look to the totality of the circumstances to determine whether the individual appellees face an immediate threat of injury. Therefore, it is the government's position, it is irrelevant that Hamide and Shehadeh have been charged with violations of the challenged provisions because, as "permanent resident" aliens, they could not be deported for routine status violations. The same is true of the exclusion proceedings involving Fouad Rafeedie, a permanent resident and an alleged member of the PFLP, which were initiated when he tried to reenter the country. See *Rafeedie* v. *INS*, 880 F.2d 506 (D.C. Cir. 1989).

The individual appellees contend that their standing is not affected by the fact that they are not currently charged with violations of the challenged provisions. They assert that they intend to engage in the proscribed conduct in the future and that the government has demonstrated its continued intention to enforce the challenged provisions. Since there is a continued threat of prosecution, individual appellees argue, standing exists. Therefore, they assert there is standing. Moreover, they argue, while they might ostensibly be deported for routine immigration violations, the real reason for such deportation would be based upon their participation in the constitutionally protected activity rather than the commission of allegedly routine violations. Finally, they challenge as disingenuous the government's argument that it has tactical reasons to recharge the individual appellees. They note that during the pendency of this appeal, the government added charges against Hamide and Shehadeh based on Section 1251(a)(6)(F)(ii), which had not been challenged in the district court. This change, they say, proves that the government has a ready stand-by: invocation of the challenged provisions whenever it may deem that appropriate.

Because the individual appellees are not currently charged with violations of the challenged statutory provisions, they must show that the threat of future injury is both "real and immediate." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). This standing requirement is not satisfied merely by showing some "conjectural" or "hypothetical" injury, *O'Shea* v. *Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L.Ed.2d 674 (1974), or an injury which is "subjective," *Laird*, 408

U.S. at 13-14, 92 S. Ct. at 2325-26. Moreover, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy ... if unaccompanied by any continuing, present adverse effects.'" *Lyons*, 461 U.S. at 102, 103 S. Ct. at 1665 (quoting *O'Shea*, 414 U.S. at 495-96, 94 S. Ct. at 676).

We conclude, however, that the individual appellees meet the standing test. It is not necessary that they currently be subject to the challenged provisions in order to have standing; nor need they actually commit the forbidden provisions as a means of showing them to be in the dilemma which the court described in *Steffel* v. *Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 1217, 39 L.Ed.2d 505 (1974), as "the hapless plaintiff between the Scylla of intentionally flouting . . . [the] law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." See also *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L.Ed.2d 895 (1979). Nor is this a case in which the individual appellees' claimed threat of future injury is merely "hypothetical" or "conjectural." Already they have once been charged with the challenged provisions, which charges were dropped, not because they were considered inapplicable, but for tactical reasons. Compare *Younger* v. *Harris*, 401 U.S. at 42, 91 S. Ct. at 749 (denying standing in part because plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible"). Presumably, then, the individual appellees need not run the risk of the consequences of another

violation of the challenged provisions in order to find protection.

However, even if they had not already been charged with violating the challenged provisions, the individual appellees would have standing. The challenged statute, unlike the government conduct challenged in *Laird*, is regulatory and proscriptive in nature, *see* 408 U.S. at 11, 92 S. Ct. at 2324, and the penalty for noncompliance is high. *See Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 642-43, 98 L.Ed.2d 782 (1988).[4] Moreover, the individual appellees fall within the class of persons whose conduct the statute proscribes, *see Doe* v. *Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745, 35 L.Ed.2d 201 (1973), and against whom the government has already instituted proceedings under the challenged provisions. *See Steffel*, 415 U.S. at 459, 94 S. Ct. at 1215. Each case in which the government already has ventured into prosecution underscores the government's willingness to use the challenged provisions against aliens who are considered to be members of the PFLP. Furthermore, if it is true that Hamide and Shehadeh have been charged with the challenged provisions merely as a means of bringing about their deportation (since they have permanent resident status) this lends credence to their argument that the government may yet bring the challenged charges against the individual appellees. Their fears are

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[4] While the government correctly notes that deportation is not a criminal sanction, it has long been considered by the Supreme Court as "a drastic sanction, one which can destroy lives and disrupt families. . . ." *See, e.g., Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479, 83 S. Ct. 1819, 1824, 10 L.Ed.2d 1013 (1963).

therefore neither speculative nor imaginary as in *Younger*, 401 U.S. at 42, 91 S. Ct. at 749.

We turn now to the government's argument that the likelihood that the individual appellees are unlikely to be recharged for violations of the challenged provisions because to do so would be administratively inefficient. We do not readily see that the government's refusal to disavow future use of the challenged provisions alone provides standing to the individual appellees. Nevertheless, it is an attitudinal factor the net effect of which would seem to impart some substance to the fears of the individual appellees. *See American Booksellers Ass'n*, 484 U.S. at 393, 108 S.Ct. at 643 (this "alleged danger of the statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494, 85 S. Ct. 1116, 1125, 14 L.Ed.2d 22 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one"); *NAACP* v. *City of Richmond*, 743 F.2d 1346, 1353 (9th Cir. 1984).

Finally, this case is not an analog of *Golden* v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), which is cited to us as an argument against standing. Zwickler was convicted of violating New York's election laws during his Congressional campaign. While his appeal to the Supreme Court was pending, Zwickler became a judge. The Supreme Court denied review because it appeared unlikely that Zwickler would again be a candidate for Congress. *Id.* at 109, 89 S. Ct. at 960. Unlike Zwickler's case, the positions of the individual appellees have not changed materially since the government withdrew the ideo-

logical charges against them. They are still subject to deportation either because the challenged statute may be invoked, or, alternatively, for routine status violations, and in either case, the two procedures are means of reaching the same result. In any event, on the whole, we cannot say that the cases of the individual appellees are such as to render it unlikely that they would engage in the acts which allegedly rendered them subject to deportation under the challenged provisions.

For the above reasons, the individual appellees have standing. We therefore affirm the district court's finding on this issue.

B. Standing and American-Arab

American-Arab sues in its own right and on behalf of its members. American-Arab has standing for such suit if "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 9, 108 S.Ct. 2225, 2231-32, 101 L.Ed.2d 1 (1988) (quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L.Ed.2d 383 (1977)).

The government argues that American-Arab does not have standing to sue because it has not shown that its individual members would have standing. The government challenges the district court's reliance on the declaration of the Director of American-Arab's Legal Services Department (the "Director") which states that American-Arab "has members who would

support the PFLP, and hold PFLP views which they would advocate. . . ." Excerpt of Record at 73. The government contends that this is insufficient proof that American-Arab's members wish to engage in the activities proscribed by the challenged provisions. For the same reason, the government argues that American-Arab's statement in appellees' complaint, that its members receive and distribute literature which the government might consider a violation of one of the challenged provisions and that they financially and politically support, or would support, the PFLP are insufficient. Finally, the government argues that injury is not shown by alleging that the first amendment rights of American-Arab members have become "chilled." The government notes that the "'[c]hilling effect' is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it." *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (emphasis in original); *see* also *Laird*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" (citation omitted)).

In response, appellees argue that the Director's declaration is sufficient because American-Arab need not allege that its members *will* become members of or affiliate with the PFLP; the statute, they argue, proscribes oral and written advocacy as well. The appellees make no further argument specifically addressed to the standing of American-Arab, although

presumably they would adopt the arguments made in support of the standing of the individual appellees.

American-Arab, according to appellees' complaint, has more than 17,000 members and 6 local chapters in the United States. It publishes information of concern to Arab-Americans and provides legal services in defamation, discrimination, and immigration cases. Some of its members are of Palestinian origin and "engage in the kinds of activities which appear to be the basis for the pending deportation proceedings. . . ." Excerpt of Record at 42. Members also read and distribute literature such as *Al Hadaf and Democratic Palestine* which the government indicates are periodicals which speak for the PFLP, "'a self-described . . . Marxist-Leninist organization. . . .'" Government's Opening Brief at 40.

We need not decide whether or when allegations of "chilling effect" are sufficient injury to support standing. Even if its members are "chilled," American-Arab has not alleged sufficient facts to support standing. American-Arab's allegations sufficiently give them a "special interest" in the outcome of the present case; however, this does not provide standing. *Sierra Club* v. *Morton*, 405 U.S. 727, 738-39, 92 S. Ct. 1361, 1367-68, 31 L.Ed.2d 636 (1972). American-Arab does not allege that its members have been charged with the challenged provisions, that they are members of the PFLP, or that they in fact wish to become members of the PFLP. The allegation that American-Arab and its members receive two publications which the government believes espouse the views of the PFLP does not prove that American-Arab members are subject to or will be subject to deportation under the challenged provisions. *See Younger*, 401

U.S. at 40-42, 91 S. Ct. at 748-50; *Hardwick* v. *Bowers*, 760 F.2d 1202, 1206 (11th Cir. 1985) (heterosexual couple claiming that the state's anti-sodomy law "chilled" aspects of their private life lacked standing because they failed to show membership in a group likely to be prosecuted), rev'd on merits, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); cf. *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-689, 93 S. Ct. 2405, 2416, 37 L.Ed.2d 254 (1973) ("A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action").

We reverse the district court's finding that American Arab has standing.[5]

II. *Justiciability—Ripeness*

Although the individual appellees do have "standing", it is our conclusion that their first amendment challenges are not ripe for review. Therefore, we vacate the district court's conclusion in this respect as a basis for its judgment.

Ripeness is "'peculiarly a question of timing'" *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation* v. *Board of Oil & Gas Conservation*, 792 F.2d 782, 788 (9th Cir. 1986) (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 140, 95 S. Ct. 335, 357, 42 L.Ed.2d 320 (1974)). When considering "ripeness," we must determine whether the federal court is "the most appropriate

[5] American Arab also argues that it has standing to sue on its own behalf. It has, however, failed to allege facts sufficient to support this claim.

institution to address the [plaintiffs'] claims at this particular time." *Id.* at 787. Ripeness, like other justiciability issues, is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U.S. 497, 508, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961). Our resolution of this issue is, however, guided by two considerations: (1) whether the issues are fit for judicial decision and (2) whether the parties will suffer hardship if we decline to consider the issues. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), *overruled on other grounds*, *Califano* v. *Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977).

This case has come to us upon a sketchy record and with many unknown facts. Given the procedural posture of the case, the facts understandably have not been well-developed. As a result, we do not know, for example, whether the appellees are actually members of the PFLP or what specific acts the government alleges the appellees to have committed in violation of the challenged provisions. In such situations, the Supreme Court has indicated that we ought not to exercise jurisdiction. *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309, 312, 88 S. Ct. 450, 452, 19 L.Ed.2d 546 (1967) (per curiam). Even in the case of a pre-enforcement challenge such as this, the exercise of jurisdiction without proper factual development is inappropriate. As explained by the Court, "the District Court should not be forced to decide . . . constitutional questions in a vacuum." *W.E.B. DuBois Clubs*. "The effect would be that important and difficult constitutional issues would be decided devoid of factual context and before it was clear that

[the suing parties] were covered by the Act." *Id.*; *see also Abbott Laboratories*, 387 U.S. at 148-49, 87 S. Ct. at 1515-16 (agency action is not fit for judicial review if the necessary facts have not been sufficiently developed).

Additionally, we lack the benefit of the INS's interpretation of the challenged provisions. For that matter, we are not beneficiaries of even the most tentative position by the INS in that respect. Indeed, no agency or court of which we are aware has ever had an opportunity to interpret these provisions or to establish a policy implementing them. Although the provisions have been codified in various forms since 1918, *see* Act of October 16, 1918, 40 Stat. 1012, the parties have not cited, nor have we found, any case or instance when they have been previously applied or interpreted. *See Socialist Workers Party* v. *Attorney General*, 642 F. Supp. 1357, 1428-30 (S.D.N.Y. 1986) (district court declined to interpret 8 U.S.C. § 1251(a)(6)(D) and denied declarative and injunctive relief where there was no evidence that the INS was considering deportation of aliens under that statute). Prudence thus counsels us to be chary of exercising jurisdiction in this uncharted arena.

The subject guiding principles are of uncertain application and unknown operation, *see Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588-89, 92 S. Ct. 1716, 1719-20, 32 L.Ed.2d 317 (1972), and we lack the benefit of the INS's own interpretation to which we would wish to give substantial weight. *Miller* v. Youakim, 440 U.S. 125, 144, 99 S. Ct. 957, 968, 59 L.Ed.2d 194 (1979); *cf. West Coast Truck Lines, Inc.* v. *American Industries, Inc.*, 893 F.2d 229, 233 (9th Cir. 1990) (holding that agency's interpretation of the law

is final and ripe for review). To exercise jurisdiction, in advance of action by the INS, might well propel us into contravening the "basic rationale" of the ripeness doctrine: the court would become entangled in an abstract disagreement over administrative policy and would interfere before any INS decision was made affecting the parties in any concrete way. *Miller*, 440 U.S. at 148, 99 S. Ct. at 971; *see also FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242, 101 S. Ct. 488, 494, 66 L.Ed.2d 416 (1980) (noting that judicial intervention after an agency has issued a complaint but before it has initiated proceedings "denies the agency an opportunity to correct its own mistakes and to apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary" (citation omitted)).

Finally, we believe that any hardship suffered by the individual appellees resulting from our decision to delay resolution of their claims does not amount to a justification for us to exercise jurisdiction. The individual appellees are not now charged under the challenged provisions. Moreover, if charged and found deportable for violation of the challenged provisions, the individual appellees will have the opportunity to present their constitutional challenges to a court. *See Chadha* v. *INS*, 634 F.2d 408 (9th Cir. 1980), aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983). We therefore do not have a case in which "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees." *Duke Power Co.* v. *Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 82, 98 S. Ct. 2620, 2635, 57 L.Ed.2d 595 (1978). Contrariwise, adequate procedures exist for the vin-

dication of the individual appellees' claims. To exercise jurisdiction at this stage would thus be premature. *See W.E.B. DuBois Clubs*, 389 U.S. at 312, 88 S. Ct. at 452; *see also Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-20, 104 S. Ct. 2862, 2881-82, 81 L.Ed.2d 815 (1984).

In the absence of factual context upon which to rely in formulating a decision, the benefit of the INS's interpretation of the statute, its position with respect to the challenged provisions, or sufficient hardship to the individual appellees resulting from a refusal to exercise jurisdiction, we conclude that the issues here are simply not ripe for review. Thus, we find the "[p]roblems of prematurity and abstractness . . . present 'insuperable obstacles' to the exercise of . . . jurisdiction, even though that jurisdiction is technically present." *Gilligan*, 406 U.S. at 588, 92 S. Ct. at 1719 (quoting *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 574, 67 S. Ct. 1409, 1422, 91 L. Ed. 1666 (1947)).

Nor is it proper to exercise jurisdiction over appellees' facial attacks on the challenged provisions. It is true that an established factual record and existing agency interpretation are not necessarily required before we will entertain a facial challenge. *See City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.11, 108 S. Ct. 2138, 2151 n.11, 100 L.Ed.2d 771 (1988). But, given the circumstances of this case, the challenged provisions present only "harmless, empty shadows." *Poe* v. *Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L.Ed.2d 989 (1961). The provisions at issue here have been supplanted by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1251).

Moreover, none of the individual appellees is currently charged, and the United States has expressly disavowed any intention of filing future charges against the appellees under the challenged provisions. The challenged provisions, which have gone unenforced for so many years, and which present no substantial threat of being enforced in the future, do not give rise to a controversy ripe for decision.

CONCLUSION

The district court's determination that the individual appellees have standing is AFFIRMED. The district court's determination that American-Arab has standing is REVERSED. Regardless of standing, we hold that the trial court improvidently exercised jurisdiction because the issues presented simply were not ripe for review. Accordingly, we VACATE the judgment and REMAND to the district court for proceedings consistent with this opinion. Parties will bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, VACATED, and REMANDED.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-02107-SVW

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *ET AL.*, PLAINTIFFS

v.

EDWIN MEESE, III, *ET AL.*, DEFENDANTS

Jan. 26, 1989
[As Amended Aug. 31, 1989]

Before: WILSON, District Judge.

Plaintiffs Khader Musa Hamide and Michel Ibrahim Shehadeh ("Hamide and Shehadeh"); Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, Aiad Khaled Barakat, Naim Nadim Sharif, Amjad Mustafa Obeid ("Other Six"); American-Arab Anti-Discrimination Committee, Arab-American Democratic Federation, Association of Arab American University Graduates, Irish National Caucus, Palestine Human Rights Campaign, American Friends Service Committee, League of United Latin American Citizens, Michel Bogopolsky, Darrel Meyers, and Southern California Interfaith Task Force on Central America ("Organizational Plaintiffs") move the Court for summary judgment and for declaratory and injunctive relief. They challenge the constitutionality of Sec-

tions 241(a)(6)(D), (F)(iii), (G)(v), and (H) of the McCarran-Walter Act of 1952, ("McCarran-Walter provisions"), codified in 8 U.S.C. §§ 1251(a)(6)(D), (F)(iii), (G)(v), and (H),[1] and of Sections 901(a) and

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[1] 8 U.S.C. § 1251(a)(6) provides in pertinent part:

(a) General classes

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . . . .

(6) is or at any time has been after entry, a member of any of the following classes of aliens:

. . . . .

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

. . . . .

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (iii) the unlawful damage, injury, or destruction of property; . . .

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of

901(b) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 ("FRAA"), Pub.L. No. 100-204, § 901, 101 Stat. 1331, 1399 (1987) (amended October 1, 1988).[2]

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circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision.

[2] The amended version of Section 901 provides in pertinent part:

Sec. 901. PROHIBITION ON EXCLUSION OR DEPORTAION OF ALIENS ON CERTAIN GROUNDS

(a) **IN GENERAL.**—Notwithstanding any other provision of law, no nonimmigrant alien may be denied a visa or excluded from admission into the United States, or subject to deportation because of any past, current or expected beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.

(b) **CONSTRUCTION REGARDING EXCLUDABLE ALIENS.**—Nothing in this shall be construed as affecting the existing authority of the executive branch to deport, to deny issuance of a visa to, to deny adjustment of status of, or to deny admission to the United States of, any alien—

(1) for reasons of foreign policy or national security, except that such deportation or denial may not be based on past, current, or expected beliefs, statements, or associa-

Defendants Edwin Meese, III, Alan Nelson, Harold Ezell, Ernest Gustafson, and the Immigration and Naturalization Service ("Government") move the Court to dismiss the action for lack of jurisdiction and for failure to state a claim or for judgment on the pleadings.

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tions which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States, unless such alien is seeking issuance of a visa, adjustment of status, or admission to the United States as an immigrant;

(2) who a consular official or the Attorney General knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity or is likely to engage after entry in a terrorist activity; or

(3) who seeks to enter in an official capacity as a representative of a purported labor organization in a country where such organizations are in fact instruments of a totalitarian state.

In addition, nothing in subsection (a) shall be construed as applying to an alien who is described in section 212(a)(33) of the Immigration and Nationality Act (relating to those who assisted in the Nazi persecutions), to an alien described in the last sentence of section 101(a)(42) of such Act (relating to those assisting in other persecutions) who is seeking the benefits of section 207, 208, 243(h)(1), or 245A of such Act (relating to admission as a refugee, asylum, withholding of deportation, and legalization), or to an alien who is described in section 21(c) of the State Department Basic Authorities Act of 1956 [members of the Palestine Liberation Organization ("PLO")]. In paragraph (2), the term "terrorist activity" means the organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities.

We conclude that the Other Six and the American-Arab Anti-Discrimination Committee ("ADC") have standing to challenge the McCarran-Walter provisions. On the merits, we hold that aliens within the United States are protected by the First Amendment of the United States Constitution and that this protection is not limited in the deportation arena by the Government's plenary immigration power. Applying established First Amendment principles, we find that the McCarran-Walter provisions are substantially overbroad in violation of the First Amendment. We therefore grant Plaintiffs' motion for summary judgment and request for declaratory relief. As these rulings provide Plaintiffs with an adequate remedy at law, we deny their request for injunctive relief. *See Beacon Theatres v. Westover*, 359 U.S. 500, 509, 79 S. Ct. 948, 956, 3 L.Ed.2d 988 (1959). We further deny the Government's motion for judgment on the pleadings and its motion to dismiss for lack of jurisdiction or failure to state a claim. Our holding that all aliens are entitled to First Amendment protections in the deportation setting obviates the need to address the constitutionality of Sections 901(a) and 901(b) of the FRAA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Immigration and Naturalization Service ("INS") first commenced deportation proceedings against Hamide, Shehadeh, and the Other Six in January of 1987 alleging that these aliens were deportable under the McCarran-Walter provisions. Specifically, the Government charged them with being members of or affiliated with the Popular Front for the Liberation of Palestine ("PFLP"), an organization that advocated the economic, international and governmental doctrines of world communism through written and/or printed publications issued on or under the authority of such organization. On April 23, 1987, the INS abandoned the proceedings against all the aliens on these charges. New McCarran-Walter Act charges were brought against Hamide and Shehadeh under Section 241(a)(6)(F)(iii) of the McCarran-Walter Act ("Section (F)(iii)") while the Other Six were charged with non-ideological immigration violations under 8 U.S.C. ss 1251(a)(2) and 1251(a)(9).

This Court first heard challenges to the deportation proceedings and the constitutionality of the McCarran-Walter provisions in April of 1987. In our May 21, 1987 and June 3, 1987 Orders, we held that the matter was not ripe for decision because Hamide and Shehadeh had not exhausted their administrative remedies with the INS and because a direct review of the statute was available through mandamus to the Ninth Circuit Court of Appeals. The Court of Appeals in its February 24, 1988 Order agreed that the case was not justiciable and refused to review the statute because Hamide and Shehadeh had not exhausted their administrative remedies.

In 1987, after we first held hearings in this matter, Congress passed the FRAA which provided in Section 901(a), *inter alia*, that aliens could not be deported on the basis of expression or beliefs that would be protected by the First Amendment if engaged in by United States citizens. Section 901(b) of the FRAA carved out several exceptions to the general rule stated in Section 901(a). In particular, Section 901(b) excepts members of the PLO from the protection of

Section 901(a).[3] This statute was thereafter modified in October 1988 so that it applied only to nonimmigrant aliens.[4]

After the Ninth Circuit's decision, Hamide, Shehadeh, the Other Six, and the Organizational Plaintiffs again asked this Court to review the constitutionality of the McCarran-Walter provisions and Section 901(a) and Section 901(b) of the FRAA. We first address their standing to make these challenges.

DISCUSSION

I. STANDING

A. *Standing of Hamide and Shehadeh*

In its May 21, 1987 and June 3, 1987 Orders, this Court dismissed Hamide and Shehadeh's claim on the basis that they could seek interlocutory review of their claim by the Ninth Circuit under the All Writs Act, 28 U.S.C. § 1651. In its February 24, 1988 Order, the Ninth Circuit denied Hamide and Shehadeh's petition for a writ of mandamus. *Hamide v. United States District Court*, No. 87-7249 (9th Cir. Feb. 24,

[3] We will refer to this Section 901(b) exception for PLO members as the "PLO Exception."

[4] Under 8 U.S.C. § 1101(a)(15), all aliens are presumed to be immigrant aliens unless they fall within one of the specifically enumerated classes of nonimmigrant aliens. For example, among the Other Six, Naim Nadim Sharif and Aiad Khaled Barakat were admitted under 8 U.S.C. § 1101(a)(15)(B) as temporary visitors; Julie Nuangugi Mungai was admitted under 8 U.S.C. § 1101(a)(15)(H)(i) as a temporary worker; and Amjad Mustafa Obeid, Ayman Mustafa Obeid, and Bashar Amer were admitted under 8 U.S.C. § 1101(a)(15)(F) as students.

1988). The Court of Appeals expressly declined to consider the constitutional issue posed by the petition, stating that the petitioners had not exhausted their administrative remedies. In addition, the Court of Appeals ruled that this Court lacked jurisdiction to hear Hamide and Shehadeh's constitutional challenge to Section (F)(iii).

Since Hamide and Shehadeh have still not exhausted their administrative remedies and the Ninth Circuit retains exclusive jurisdiction under 8 U.S.C. § 1105a to review their final deportation order, this Court lacks jurisdiction to hear their claim. Acting pursuant to the Ninth Circuit's Order, this Court denies standing to Hamide and Shehadeh to challenge the McCarran-Walter provisions or Section 901 of the FRAA.

B. *Standing of the Other Six*

Under Article III of the United States Constitution and the express terms of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, federal courts may hear legal claims only if they arise from an "actual controversy."[5] A case or controversy requires a plaintiff to have a personal stake in the outcome sufficient to assure an adversarial presentation

[5] 28 U.S.C. s 2201(a) provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

of the case. *See Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L. Ed. 2d 663 (1962); *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir.1985), rev'd on other grounds, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); *see also Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506, 92 S. Ct. 1749, 1755, 32 L. Ed. 2d 257 (1972) (an "actual controversy" under the Declaratory Judgment Act exists when "'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'") (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed.826 (1941)).

For a plaintiff to have standing under Article III and the Declaratory Judgment Act, he or she must, "at an irreducible minimum," claim that he or she has "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L.Ed.2d 700 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). The case or controversy requirement is therefore closely related to the standing requirement. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S. Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 822 (9th Cir.1987). Both standards depend on whether Plaintiffs can demonstrate that they face a sufficiently "real and immediate" threat of prosecution under the McCarran-Walter provisions and Section 901 of the

FRAA. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S. Ct. 1660, 1665-66, 75 L.Ed.2d 675 (1983); *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S. Ct. 956, 959, 22 L. Ed. 2d 113 (1969).

In defining what constitutes a "real and immediate" threat, courts have contrasted this type of threat to one that is merely "conjectural or hypothetical," *Lyons*, 461 U.S. at 102, 103 S. Ct. at 1665; *Zwickler*, 394 U.S. at 109-10, 89 S. Ct. at 960-61 "imaginary and speculative," *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974), or "chimerical," *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L.Ed.2d 989 (1961). To allege a "real" threat in the First Amendment context, a plaintiff must show that the challenged law not only subjectively chills his First Amendment rights but also objectively chills them by threatening "specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 2325-26, 33 L.Ed.2d [illegible] (1972). What constitutes an "immediate" threat of prosecution has been the subject of dispute between the parties.

The Government contends that "'immediate' means 'now'"; in other words, the threat's immediacy must be exceptionally great and a plaintiff must be facing imminent charges and an almost certain conviction. Gov't Memo. of Nov. 9, 1988, at 1-4. Plaintiffs argue that "immediate" refers to the chilling effect on a plaintiff's First Amendment rights that occurs whenever a plaintiff faces a real threat of prosecution. Plaintiff Supp. Memo. of Nov. 14, 1988, at 2-3. The question thus framed is whether Plaintiffs must face a threat of an "immediate prosecution" or whether they satisfy the "immediate" requirement by alleging

an "immediate chill" from a threat of a credible, potential prosecution.

We believe that the terms "immediate prosecution" and "immediate chill" are inextricably intertwined. In any given situation, the more "immediate" the threat of prosecution, the more "immediate" the chill. *See Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir.1987). A pre-enforcement First Amendment challenge does not necessarily require a plaintiff to confront a threat of prosecution the next day, the next week or the next month to have standing. The threat of prosecution just cannot be too remote in the future to no longer be real and objectively-based. Thus, if any member of the Other Six demonstrates that he or she faces a sufficiently real and immediate threat of prosecution under the challenged statutes that immediately chills him or her from exercising his or her First Amendment rights, the threat of prosecution will be considered suitably "real and immediate" to satisfy the standing and Article III case or controversy requirements.

The Government avers that none of the Other Six faces a real and immediate threat of prosecution under the McCarran-Walter provisions and Section 901(b) of the FRAA and that they should therefore be denied standing. Specifically, the Government maintains that in the past thirty-six years, the McCarran-Walter provisions have rarely been invoked. It is too speculative, it argues, to believe that it would charge the Other Six under the McCarran-Walter provisions after such charges have already been brought and dropped. The Other Six are already alleged to be deportable on the basis of routine immigration status

violations.[6] There would be no reason for the Government to pursue the far more complex and time-consuming course of bringing McCarran-Walter provisions charges against them. Hence, the Government argues, any chill the Other Six might be suffering is too subjective and remote given the unlikelihood that the Government will prosecute under these charges. Gov't Memo. of Sept. 2, 1988 at 8.

In order to estimate whether a party faces a real and immediate threat of prosecution and chill of his or her First Amendment rights, courts have examined the government's interest in enforcing the challenged statute, along with its past enforcement patterns, and the party's interest in engaging in the prohibited activity. *See Hardwick*, 760 F.2d at 1205; *American Baptist Churches in the U.S.A. v. Meese*, 666 F. Supp. 1358, 1363 (N.D. Cal. 1987).

The Government in this case has demonstrated that it has an interest in excluding and deporting PFLP members generally and enforcing the McCarran-Walter provisions against alleged PFLP members and the Other Six specifically. Over the last two and a half years, the Government has engaged in exclusion and deportation actions against aliens who it alleged were PFLP members. For instance, in May 1986 the Government excluded and deported Suliemann Shehadeh under Sections 212(a)(27) and 212(a)(29) of

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[6] Bashar Amer, Aiad Khaled Barakat, Julie Nuangugi Mungai, Naim Nadim Sharif, Amjad Mustafa Obeid, and Ayman Mustafa Obeid have been served with Orders to Show Cause that include a charge under 8 U.S.C. § 1251(a)(2) that each "overstayed" his or her visa term. Bashar Amer's Order to Show Cause additionally charged him with failing to maintain student status under 8 U.S.C. § 1251(a)(9).

the Immigration and Nationality Act because of his affiliation with the PFLP. Decision of Immigration Judge, File No. 838-399-412 (May 22, 1986). The Government has further initiated summary exclusion proceedings in December 1987 under 8 U.S.C. § 1225(c) against Fouad Rafeedie, a permanent resident alien, because of his PFLP affiliation. Notice of Initiation of Summary Exclusion under Section 235(c), File No. 34-679-905 (December 31, 1987); *see Rafeedie v. INS*, 688 F. Supp. 729 (D.D.C.1988).

The Government's desire to utilize the McCarran-Walter provisions against PFLP members is manifested in its current attempt to deport Hamide and Shehadeh for violating Section (F)(iii) by being members of or affiliating with an organization that advocates or teaches the unlawful damage, injury or destruction of property. In particular, the Government has based these charges on Hamide and Shehadeh's alleged membership or affiliation with the PFLP. *In re Shehadeh*, File No. A30-660-528 (April 28, 1987) (Substituted Charges of Deportability); *In re Hamide*, File No. A19-262-560 (April 28, 1987) (Substituted Charges of Deportability).

While the Other Six need not allege a specific threat of prosecution against them individually to have standing, *Hardwick*, 760 F.2d at 1205, in this case they can. The Government has expressly stated that it considers the Other Six to fall within the class of persons who are properly deportable under the McCarran-Walter provisions. This is evidenced by the statement of former F.B.I. Director William H. Webster who, in the 1987 hearings concerning the confirmation of his nomination to be Director of Central Intelligence, declared: "[A]ll of them [the

Other Six, Hamide and Shehadeh] were arrested because they are alleged to be members of a worldwide Communist organization which under the McCarran Act makes them eligible for deportation . . . in this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest." *Hearings Before the Senate Select Committee on Intelligence on Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong. 1st Sess. 94, 95 (April 8, 9, 30 1987; May 1, 1987).

In addition to stating its prosecutorial interest against the Other Six, the Government has already brought charges against them under the McCarran-Walter provisions in January, 1987, dropping the charges over twelve weeks later at the April 23, 1987 hearing before the Court. The Government has not disavowed its intent to bring these same charges against the Other Six in the future despite ample opportunity to do so.

As for the Other Six, we must assess their interest in engaging in the type of First Amendment actions deemed deportable under the McCarran-Walter provisions. The Other Six allege that but for the McCarran-Walter provisions and Section 901(b) of the FRAA, they would engage in the expressive activities that led the INS to charge them under the McCarran-Walter provisions in 1987. *See* Mungai Supp. Declaration ¶ 6; Amer Declaration ¶ 4; Amjad Obeid Declaration ¶¶ 4-5; Barakat Declaration ¶¶ 4-5. These activities include reading and distributing magazines published by the PFLP, supporting or discussing the PFLP or its views in public meetings and demonstrations, and raising money to support these activities.

See Second Amended Complaint ¶ 22. While a plaintiff hoping to challenge a statute might tend to exaggerate his or her intention to participate in the proscribed actions, we believe that the Other Six do not allege their desire to pursue the First Amendment activities prohibited by the McCarran-Walter provisions merely as a ruse to obtain standing. On the contrary, after reading the submitted declarations, we find that the Other Six demonstrate an authentic interest in participating in the prohibited First Amendment activities as part of their normal course of activity. *See Hardwick*, 760 F.2d at 1205.

After examining the parties' interests, we conclude that the Government has demonstrated a strong interest in prosecuting PFLP members under the immigration laws generally and the Other Six and other PFLP members under the McCarran-Walter provisions in particular. The Other Six have evinced a genuine interest in engaging in the proscribed conduct. Under these circumstances, the Other Six confront a sufficiently real and immediate threat of prosecution under the McCarran-Walter provisions to establish their standing to challenge these provisions.

In addition to the interest analysis conducted above, relevant case law supports the Other Six's standing. In *Hardwick*, *supra*, the State arrested and charged plaintiff Hardwick, a practicing homosexual, with violating Georgia's sodomy statute, only to subsequently drop these charges. The *Hardwick* Court found that though the State had dropped the charges, the State had not declared that it would not prosecute Hardwick in the future under the challenged law. Viewing the evidence of past prosecution as raising a

strong inference that future prosecutions were likely, the Court concluded that Hardwick had standing to contest Georgia's sodomy statute. *Hardwick*, 760 F.2d at 1205 ("[a] past enforcement effort often will confirm the reasonableness of a plaintiff's subjective fear of prosecution"). Similarly, in this case, the past prosecution of the Other Six confirms the reasonableness of their fear of prosecution and raises a strong inference that future prosecutions are likely.

Distinguishing *Hardwick* from this case, the Government argues that Hardwick did not face any alternate sodomy charges other than those under the challenged sodomy law. The inference was strong in that case that future prosecutions under the challenged sodomy law would be likely because no other sodomy law existed under which Hardwick could have been prosecuted. Here, the Other Six currently face routine status deportation charges, making future prosecutions under the McCarran-Walter provisions too remote and unlikely.

In *Hardwick*, however, the Court granted Hardwick standing even though he did not allege other specific instances of prosecution of similarly situated homosexuals under the challenged sodomy law. To that extent, the Other Six present a more real and immediate threat of prosecution, relying not just on their previous prosecution but also on the current prosecutions against Hamide and Shehadeh. *See Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974) (where plaintiff had not been arrested under the statute, the prosecution of his companion under the statute is "ample demonstration that [plaintiff's] concern with arrest has not been

'chimerical'," citing *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961)).

Furthermore, the Government, like the State in *Hardwick*, has not disavowed its intent to enforce the challenged provisions. *See Hardwick*, 760 F.2d at 1206; *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 108 S.Ct. 636, 642, 98 L. Ed. 2d 782 (1988) (standing found for booksellers because, *inter alia*, "[t]he State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302, 99 S. Ct. 2301, 2311, 60 L.Ed.2d 895 (1979) (standing upheld for unions because, *inter alia*, "the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices"). Nor has the Government claimed that it has *never* enforced these provisions despite aliens "commonly and notoriously" violating them. Only where the Government has met one or both of these conditions, disavowal of intent to enforce or complete nonenforcement in the face of common and notorious violations, have courts found that the threat of prosecution was not real and immediate. *Compare Poe v. Ullman*, 367 U.S. at 502, 508, 81 S. Ct. at 1755, 1758 (threat of prosecution under Connecticut law banning contraceptives held "chimerical" because the ban had never been enforced during its over seventy-five year history even though contraceptives were commonly and notoriously sold in Connecticut drug stores); with *San Francisco Democratic Central Committee v. Eu*, 826 F.2d 814, 822 (9th Cir. 1987) (standing found despite State's total nonenforcement of challenged Election Code provisions because no record shown that provisions were commonly and notoriously violated).

Where plaintiffs genuinely allege that but for the challenged statute, they would engage in the proscribed First Amendment activities, courts have granted them standing even when the statute has never been enforced or has never been enforced against them. In the first category where a statute has never been enforced against anyone, the Supreme Court has recognized a plaintiff's standing to contest the statute. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 108 S. Ct. 636, 642, 98 L.Ed. 2d 782 (1988) (conferring standing to booksellers to challenge never-enforced statute restricting display of sexually explicit literature); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (granting standing to newspaper publisher to contest never-enforced municipal ordinance requiring licensing for placement of newsracks on public property). The Ninth Circuit reached a similar conclusion in *San Francisco Democratic Central Committee*, *supra*. In that case, the Court determined that the plaintiffs had standing to lodge a First Amendment challenge to various sections of the California Elections Code even though the State had never invoked these sections against any political organization. The Court specifically relied on the Supreme Court's decision in *Epperson v. Arkansas*, 393 U.S. 97, 101-02, 89 S. Ct. 266, 268-69, 21 L.Ed.2d 228 (1968), where a teacher was granted standing to challenge a statute prohibiting the teaching of evolution, even though the statute had never been enforced against anyone during its forty years on the record

books. *San Francisco Democratic Central Committee*, 826 F.2d at 822.[7]

In the second category, courts have conferred standing on plaintiffs to challenge statutes that impinge on their constitutional rights, even though those plaintiffs had never been personally subjected to prosecution under the statutes. This type of pre-enforcement challenge, the type of challenge at issue in the instant case, allows a plaintiff to contest a statute without having to expose himself to an actual arrest or prosecution or deportation. *See Babbitt*, 442 U.S. at 298-99, 99 S. Ct. at 2308-09 (upheld pre-enforcement challenge to provisions of the Arizona farm labor statute despite plaintiffs never having been charged under the provisions); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974) (sustained pre-enforcement First Amendment challenge to Georgia criminal trespass law for a plaintiff never prosecuted under the statute); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745, 35 L.Ed.2d 201 (1973) (allowed pre-enforcement challenge by doctors to Georgia abortion statute "despite the fact

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[7] The *San Francisco Democratic Central Committee* Court further noted that "the aftermath of *Poe* teaches that federal courts should not lightly determine that a statute has fallen into desuetude." 826 F.2d at 822 n. 15. *Compare Poe v. Ullman*, *supra*; with *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) (Connecticut statute banning contraceptives that the Supreme Court found a dead letter in *Poe* struck down after the State prosecuted two persons, including a doctor, for openly counseling married persons on the use of contraceptives). Similarly, in this case, though the Government has rarely used the McCarran-Walter provisions in their thirty-six year history, it has recently resurrected these provisions for use against PFLP members.

that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes"); *Sable Communications of California, Inc. v. FCC*, 827 F.2d 640, 643-44 (9th Cir. 1987) (permitted pre-enforcement First Amendment challenge to federal obscene telephone call statute by a plaintiff whom the State had never prosecuted under the statute); *Polykoff v. Collins*, 816 F.2d at 1331 (upheld pre-enforcement challenge to Arizona criminal obscenity statute where plaintiffs had never been prosecuted).

Particularly with pre-enforcement First Amendment challenges, courts have found standing based, in part, on their sensitivity to the danger of "self-censorship[,] a harm that can be realized even without an actual prosecution." *American Booksellers*, 108 S.Ct. at 642; *see Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L.Ed.2d 22 (1965) ("'[t]he threat of sanctions may deter [the lawful exercise of First Amendment rights] ... almost as potently as the actual application of sanctions'" (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963)); *Polykoff*, *supra* (plaintiffs granted standing to lodge a pre-enforcement First Amendment challenge because, *inter alia*, the chilling of protected speech under Arizona's statutory system for obscenity would be "immediate").

The Other Six have demonstrated that the Government has used the McCarran-Walter provisions to quell their First Amendment activities in the past, is currently prosecuting other alleged PFLP members under these provisions, and has not disavowed its intent to prosecute the Other Six in the future. As such, they present a stronger case for standing than

did the plaintiffs in *American Booksellers*, *Lakewood*, *Epperson*, and *San Francisco Democratic Central Committee* where the statute at issue had never been enforced. The standing of the Other Six is also more compelling than the plaintiffs' standing in *Babbitt*, *Steffel*, *Doe*, *Polykoff*, and *Sable* where the plaintiffs had never been prosecuted under the challenged statute.

We agree with the Government that were the Other Six only to allege a "subjective chill" based on the mere existence of the McCarran-Walter provisions and Section 901(b) of the FRAA without anything more concrete, they would not be entitled to standing. *See Laird v. Tatum*, 408 U.S. at 10- 14, 92 S. Ct. 2318, 2324-26, 33 L.Ed.2d 154 (denied standing to plaintiff who alleged "subjective chill" of First Amendment rights due to mere existence, without more, of a governmental investigative and data-gathering activity); *Younger v. Harris*, 401 U.S. 37, 41-42, 91 S. Ct. 746, 749-50, 27 L.Ed.2d 669 (1971) (denied standing to plaintiffs who did not claim that they had ever been threatened with prosecution, that a prosecution was likely, or even that a prosecution was remotely possible); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-81 (D.C. Cir. 1 984) (denied standing to plaintiffs who did not adequately aver that any specific action is threatened or even contemplated against them; their alleged harms constituted "nothing more than a generalized grievance against the intelligence-gathering methods sanctioned by the President"); *Hardwick*, 760 F.2d at 1206 (rejected standing of Does, the heterosexual couple, because they did not allege a realistic threat of prosecution, only that the existence of the sodomy

statute plus Hardwick's arrest chilled their actions). Unlike the plaintiffs in *Laird*, *Younger*, *United Presbyterian Church*, and *Hardwick*, however, the Other Six have not only claimed that they are chilled from the statutes in question but that they face a "very real threat" of prosecution under these statutes. Mungai Supp. Declaration ¶ 3. This "very real threat" of prosecution is substantiated by past and present concrete instances of prosecution under the McCarran-Walter provisions. In contrast to the plaintiffs in Lyons, 461 U.S. at 105-08, 103 S. Ct. at 1666-68 (recurrence of allegedly unlawful police treatment of plaintiff found too speculative to warrant standing), *Rizzo v. Goode*, 423 U.S. 362, 372, 96 S. Ct. 598, 604-05, 46 L.Ed.2d 561 (1976) (same), and *O'Shea v. Littleton*, 414 U.S. 488, 493-97, 94 S. Ct. 669, 674-75, 38 L.Ed.2d 674 (1974) (same), the Other Six have properly established the *"reality* of the threat of repeated injury," *Lyons*, 461 U.S. at 107 n. 8, 103 S. Ct. at 1668 n. 8 (emphasis in original).

Moreover, while both the *Laird* and *United Presbyterian Church* courts denied standing, they acknowledged that standing would exist where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Laird*, 408 U.S. at 11, 92 S. Ct. at 2324; *United Presbyterian Church*, 738 F.2d at 1378 (quoting *Laird*). The Ninth Circuit relied on this distinction to find standing in *Sable Communications of California*, *supra*. In that case, the Court granted the plaintiff pre-enforcement standing to challenge a statute regulating sexually

explicit telephone services. The Court noted that the government considered the statute to be applicable to the plaintiff, that the government specifically declined to agree not to enforce the statute against the plaintiff, that the penalties for noncompliance were substantial, and that the government had prosecuted one of the plaintiff's competitors under the statute. Under these circumstances, the Court found that the statute was compulsory in nature and that the plaintiff was currently subject to its requirements. *Sable*, 827 F.2d at 643-44.

In the case at bar, as in *Sable*, the Government considers the McCarran-Walter provisions and Section 901(b) of the FRAA to be applicable to the Other Six[8] and has specifically refused to state that it will not bring such charges against them. The penalty for the statute's violation—deportation—is substantial, and the Government is proceeding against two other alleged PFLP members under the statute. As in *Sable*, the challenged provisions are compulsory as well as proscriptive in nature. As aliens, the group directly targeted by the statute, the Other Six are presently subject to the statute's requirements. *See Doe v. Bolton*, 410 U.S. at 188, 93 S. Ct. at 745 (pre-enforcement standing found for doctors, "against

[8] Since the Government has expressly stated at oral argument and in its briefs, *see e.g.*, Gov't Memo. of Sept. 2, 1988, at 29-31, that it considers the PLO Exception to apply to PFLP members, we do not reach the issue of whether the PLO Exception encompasses solely PLO members or affiliate groups' members as well. The fact that the Government treats PFLP members as within Section 901(b)'s exception to Section 901(a)'s constitutional protections heightens the reality and immediacy of the threat of prosecution faced by alleged PFLP members, like the Other Six, under the McCarran-Walter provisions.

whom these criminal statutes directly operate"). Hence, like in *Sable*, the threat of prosecution facing the Other Six is not too "speculative" or "hypothetical," *Sable*, 827 F.2d at 643, to warrant the invocation of federal jurisdiction.

Under the above analysis, we conclude that each member of the Other Six faces a "real and immediate" threat of prosecution under the McCarran-Walter provisions and Section 901 of the FRAA. They therefore present an objectively-based and "immediate" chill of their First Amendment rights sufficient to provide them with standing.

C. *Organizational Plaintiffs*

In *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988), the Supreme Court reiterated its test set forth in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977), for determining whether an organization has standing to sue on behalf of its members. Under that test, an organization has standing "when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *New York State Club*, 108 S. Ct. at 2231-32 (quoting *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441).

The Court holds that the ADC has met the three-part *Hunt* test for associational standing. Under the first prong of the test, an organization must allege "that its members, or any one of them, are suffering immediate or threatened injury as a result of the

challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . ." *Hunt*, 432 U.S. at 342, 97 S. Ct. at 2441 (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343 (1975)). Applying the same analysis to the ADC's members as was used to measure whether the Other Six faced a real and immediate threat of prosecution, we find that the ADC's members confront a similar threat of prosecution under the McCarran-Walter provisions and Section 901(b) of the FRAA.

The ADC represents both immigrant and nonimmigrant aliens who would support the PFLP and hold PFLP views but for the real threat that the INS would institute deportation proceedings against them under the McCarran-Walter provisions. Mokhiber Fifth Declaration ¶ 2 (Mokhiber is currently the Director of the Legal Services Department of the ADC). After reading the submitted declarations, we view these ADC members' desire to engage in the proscribed activities as genuine. Moreover, the Government demonstrates a continuing interest in enforcing the McCarran-Walter provisions against these members. This interest is evidenced by the Government's past prosecutions against alleged PFLP members (Suliemann Shihadeh and Fouad Rafeedie), its past prosecution of the Other Six as alleged PFLP members under the McCarran-Walter provisions, its current enforcement of one of the McCarran-Walter provisions against Hamide and Shehadeh for their alleged PFLP membership, and its refusal to disavow its intent to enforce these provisions in the future. *Compare Hardwick*, 760 F.2d at 1206 (heterosexual couple denied standing where

court could determine that a heterosexual couple was in a different position from a homosexual when the State had only demonstrated an interest in prosecuting homosexuals under the sodomy statute); *Younger v. Harris*, 401 U.S. at 41-42, 91 S. Ct. at 748-49 (three intervenors denied standing because they never claimed to be threatened with prosecution under the challenged statute or that a prosecution was likely or even remotely possible). Unlike the Other Six, the ADC members do not face routine deportation charges for status violations; this lack of an alternative avenue through which the Government could deport them heightens the reality and immediacy of the threatened prosecution under the McCarran-Walter provisions. Therefore, the ADC members would have standing to sue in their own right.

Under the second prong of the *Hunt* test, the interest the organization seeks to protect must be germane to the organization's purpose. The Government avers that the ADC merely has an "abstract and unconnected concern" with respect to the McCarran-Walter provisions since its purpose is not to violate these provisions. Gov't Memo. of Sept. 2, 1988, at 16. While the ADC does not define its purpose in terms of violating deportation laws, it does state its purpose to be the defense of the rights and promotion of the heritage of Arab-Americans through legal action in cases of discrimination and immigration and publication of information on issues of concern to Arab-Americans. Second Amended Complaint ¶ 7. Since the interests the ADC seeks to protect in this case are the constitutional rights for its Arab-American members, including immigrant aliens and nonimmigrant aliens, to engage in First Amendment activities

proscribed by the McCarran-Walter provisions, we find that these interests are germane to the ADC's purpose.

Under the third prong, we find that the claims for declaratory and injunctive relief asserted by the ADC do not require the participation of the individual members in the lawsuit. In a facial challenge such as this, "there is complete identity between the interest of the [ADC] and those of its member [s] . . . with respect to the issues raised in this suit, and the necessary proof [can] be presented 'in a group context.'" *New York State Club*, 108 S. Ct. at 2232 n. 4 (quoting *Hunt*, 432 U.S. at 344, 97 S. Ct. at 2442). The ADC thus meets the Hunt criteria for associational standing.

In addition, because the ADC represents immigrant aliens as well as nonimmigrant aliens, the ADC presents a sufficiently different claim than the Other Six to warrant its standing. In contrast to the nurse, clergy, social worker and corporation-appellants in *Doe v. Bolton*, 410 U.S. at 189, 93 S. Ct. at 746, whose standing the Supreme Court rejected because their claims were already sufficiently presented by the other plaintiffs, the immigrant alien ADC members state non-duplicative claims. We conclude that the ADC enjoys standing to challenge the McCarran-Walter provisions and Section 901(b) of the FRAA.[9]

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[9] We find that the other Organizational Plaintiffs—Arab-American Democratic Federation, Association of Arab American University Graduates, Irish National Caucus, Palestine Human Rights Campaign, American Friends Service Committee, League of United Latin American Citizens, Michel Bogopolsky, Darrel Meyers, and Southern California Interfaith Task Force on Central America—have not presented sufficient evidence to meet the three prongs of the Hunt test and consequently deny them standing.

D. *Prudential Considerations*

Notwithstanding the Other Six's and the ADC's standing under Article III, the Government submits that the Court should refrain from determining the constitutionality of the McCarran-Walter provisions and Section 901 of the FRAA for prudential considerations. First, the Government asserts that the Ninth Circuit has exclusive jurisdiction to review final orders of deportation under 8 USC § 1105a. Second, the Ninth Circuit has already stated in *Hamide v. United States District Court*, *supra*, that it will not rule on the constitutionality of Section (F)(iii), under which Hamide and Shehadeh are being prosecuted, because they have not exhausted their administrative remedies. Third, by ruling on the Other Six's and the ADC's constitutional attacks on the McCarran-Walter provisions, this Court would be thwarting Congress's intent to place exclusive jurisdiction in the Ninth Circuit and to have no court review the deportation proceedings until a factual record has been developed at the deportation hearing. Fourth, if this Court proceeded to adjudicate their claims, it would create parallel tracks of litigation between itself and the Ninth Circuit, inefficiently use judicial resources, and create the possibility of conflicting decisions. Fifth, it would be anomalous to allow the Other Six or the ADC to challenge the statutes at issue when the only parties currently charged under those statutes, Hamide and Shehadeh, have been foreclosed from mounting such a challenge before this Court. *See* Gov't Memo. of Sept. 2, 1988, at 4-7, 17-20.

While the Court in its May 21, 1987 and June 3, 1987 Orders dismissed Hamide and Shehadeh's claims and stayed the Other Six's and the ADC's claims for prudential considerations, such considerations are no longer applicable. In our previous Orders, we specifically relied on Hamide and Shehadeh's ability to seek a preemptory writ of mandamus from the Ninth Circuit to rule on the constitutionality of Section (F)(iii). The Ninth Circuit sanctioned such a procedure in *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 630 (9th Cir. 1985).

The Government contends that *Bonneville Power* is dispositive on the prudential considerations now before the Court. It argues that "'where a statute commits review of final agency action to the court of appeals [even in the absence of an express statutory command of exclusiveness], *any suit* seeking relief that might affect the court's future jurisdiction is subject to its exclusive review,'" and a district court's jurisdiction under the general federal question statute (28 U.S.C. § 1331) is preempted. Gov't Memo. of Sept. 2, 1987, at 18-19 (emphasis in Gov't Memo.) (quoting *Bonneville Power*, 767 F.2d at 627). That case, however, dealt with plaintiffs involved in ongoing agency proceedings ultimately reviewable by the court of appeals. The Ninth Circuit held that these plaintiffs could not contest their ongoing proceedings in a district court because the court of appeals retained exclusive jurisdiction over the proceedings. *See also Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (court of appeals has exclusive jurisdiction over claim that ongoing administrative proceeding is

unreasonably delayed); *Air Line Pilots Ass'n Int'l v. CAB*, 750 F.2d 81 (D.C. Cir. 1984) (same).

In the case at bar, the Other Six and the ADC are not engaged in any ongoing proceedings that would allow them to challenge the McCarran-Walter provisions or Section 901 of the FRAA; the Other Six's deportation proceedings are only for routine status violations. Thus, unlike Hamide and Shehadeh, the Other Six and the ADC do not have any administrative remedies to exhaust with respect to the McCarran-Walter provisions and Section 901 of the FRAA. They are not involved in any ongoing proceedings under the statutes at issue as were the plaintiffs in *Bonneville Power*, *Telecommunications Research & Action Center*, *and Air Line Pilots* and consequently do not have to forsake district court adjudication of their claims.

Contrary to the Government's argument, the fact that Hamide and Shehadeh are involved in ongoing deportation proceedings under Section (F)(iii) and can only seek review through the Ninth Circuit does not preclude a district court from granting the Other Six and the ADC pre-enforcement standing to challenge the McCarran-Walter provisions. Courts have not abstained from hearing a plaintiff's suit because another plaintiff's action was pending in another forum. *See, e.g., Steffel*, 415 U.S. at 459, 94 S. Ct. at 1215-16 (allowed pre-enforcement standing despite plaintiff's companion being prosecuted under the same statute); *Sable*, 827 F.2d at 644 (granted pre-enforcement standing where "the government has, in fact, prosecuted one of Sable's Los Angeles-based competitors"); *Polykoff*, 816 F.2d at 1331 (found pre-enforcement standing where the State "was actively

prosecuting other owners of adult bookstores"). These cases reject the Government's theory that this Court, or for that matter any court in the United States, must desist from reviewing the McCarran-Walter provisions because of the fear of parallel tracks of litigation, inefficient use of resources, or conflicting decisions. Particularly with a First Amendment facial challenge, the type at issue here, abstention is inappropriate. *See J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 488 (9th Cir. 1984) ("abstention by federal courts in first amendment cases could often result in the suppression of free speech that is meant to be protected by the Constitution"), *rev'd on the merits, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985). Comity principles also do not prevent this Court from hearing the claims of the Other Six and the ADC since these plaintiffs are not involved in ongoing proceedings under the provisions they seek to challenge. *See Steffel*, 415 U.S. at 462, 94 S. Ct. at 1217.

In an analogous case, *Sable Communications of California, supra*, the Ninth Circuit ruled that the district court erred when it abstained from analyzing the federal obscene telephone call statute, 47 U.S.C. § 223(b), even though the court of appeals had exclusive jurisdiction under 28 U.S.C. § 2342 to review the FCC's regulations made in accordance with the statute. 827 F.2d at 643. Similarly, in the instant case, we must not abstain from reviewing the constitutionality of the McCarran-Walter provisions and Section 901 of the FRAA even though the Ninth Circuit has exclusive jurisdiction to review Hamide and Shehadeh's final deportation orders.

Facing a real and immediate threat of deportation, but not an actual deportation, under the McCarran-Walter provisions and Section 901(b) of the FRAA, the Other Six and the ADC cannot bring their constitutional arguments before the Ninth Circuit. If this Court refused to rule on their claims, they would have no forum in which to challenge the constitutionality of these statutes. Because the threat of prosecution can be as effective as an actual prosecution, *see Dombrowski v. Pfister*, 380 U.S. at 486, 85 S. Ct. at 1120, the Government could effectively quell protected constitutional activity by threatening, but never instituting, deportation proceedings. The Other Six and the ADC would then be placed in the same untenable position as the plaintiff in *Steffel* where the Supreme Court stated:

> (A) refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting [the] law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

415 U.S. at 462, 94 S. Ct. at 1217. Like the "hapless plaintiff" in *Steffel*, the Other Six and the ADC do not face any proceedings under the challenged statutes, and they believe that they have a constitutional right to engage in the proscribed activity. Consequently, they are unjustifiably caught between "the Scylla of intentionally flouting the law and the Charybdis of foregoing what [they] believe to be constitutionally protected activity in order to avoid becoming en-

meshed in a [deportation proceeding]."[10] Having found that the ADC and each member of the Other Six have standing under Article III, we do not abstain from hearing their claims for prudential reasons. We now turn to the merits of their challenges.

II. MERITS

A. *Aliens' First Amendment Rights in the Deportation Context*

Before turning to the statutes at issue, we must address the Government's argument that aliens do not enjoy First Amendment rights in the deportation context. It has long been settled that aliens within the United States enjoy the protections of the First Amendment of the United States Constitution. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n. 5, 73 S. Ct. 472, 477 n. 5, 97 L.Ed. 576 (1953); *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449, 89 L. Ed. 2103 (1945); *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 86 L.Ed. 192 (1941); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988); *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985); *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971); *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) (Blackmun, J.); *Narenji v. Civiletti*, 481 F.

[10] As counsel for the Government represented at the October 24, 1988 hearing, it could easily take four years before Hamide and Shehadeh have their cases reviewed by a federal court. Reporter's Transcript of October 24, 1988, at 29, lines 11-13. Even then their cases could be resolved in any number of ways without addressing the constitutional claims that the Other Six and the ADC seek to raise here. During this lengthy period of time, the chill on the First Amendment rights of the Other Six and the ADC members would be such that abstention is inappropriate.

Supp. 1132, 1139 n. 5 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S. Ct. 2928, 64 L.Ed.2d 815 (1980).

Recently, the Ninth Circuit in *Verdugo-Urquidez* relied on Justice Murphy's concurrence in *Bridges v. Wixon* and concluded that "aliens within the United States enjoy the benefits of the *first*, fifth, sixth and fourteenth amendments." 856 F.2d at 1222 (emphasis supplied). The Court of Appeals emphasized that "aliens within the United States" include nonimmigrant aliens as well as permanent resident aliens. *Id.*[11]

The Government concedes that aliens have First Amendment rights. Reporter's Transcript of April 27, 1987, at 10, lines 1-3. However, the Government argues that these First Amendment rights are drastically limited in the deportation context due to Con-

[11] The *Verdugo-Urquidez* Court found support for this conclusion in the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. d.2d 786 (1982) in which *illegal* aliens, i.e., aliens who could not establish that they had been legally admitted into the United States, were . . . were held to have rights under the Fourteenth Amendment. 856 F.2d at 1222. In *Plyler*, the Supreme Court rejected the argument that illegal aliens are not "persons within the jurisdiction" of the State of Texas, 457 U.S. at 210, 102 S. Ct. at 2391, and stated that "until he leaves the jurisdiction—either voluntarily, or involuntarily *in accordance with the Constitution and the laws of the United States*—[an illegal alien] is entitled to the equal protection of the laws that a State may choose to establish." 457 U.S. at 215, 102 S. Ct. at 2394 (emphasis supplied). Since none of the plaintiffs before the Court are here illegally, we do not reach the question of whether illegal aliens are protected by the First Amendment. Like the *Verdugo-Urquidez* Court, we simply draw no distinction between immigrant and nonimmigrant aliens for First Amendment purposes.

gress' plenary power over immigration To support this proposition, the Government relies on a long line of Supreme Court decisions beginning with a nineteenth century Chinese exclusion case, *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S. Ct. 1016, 37 L.Ed. 905 (1893), through the 1950's cases, *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952), and *Galvan v. Press*, 347 U.S. 522, 74 S. Ct. 737, 98 L.Ed. 911 (1954), to the recent decisions in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972), *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976), and *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed. 2d 50 (1977). The Court does not dispute this line of precedent establishing Congress' authority over immigration and the limited judicial review employed in those cases. However, as will be discussed below, only one of the Government's cases, *Harisiades*, involved a First Amendment challenge in the deportation setting. In that case, the Supreme Court applied the same First Amendment standard applicable to citizens.

1. The Constitutional Limits of Congress' Plenary Authority in the Immigration Arena

At first glance, the Government's authorities indicate that Congress has virtually absolute and unchecked power over immigration matters. In *Fong Yue Ting*, 149 U.S. at 724, 13 S. Ct. at 1026, the Supreme Court stated: "[A]liens, having taken no steps towards becoming citizens, . . . remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." In *Carlson v.*

Landon, 342 U.S. 524, 534, 72 S. Ct. 525, 531, 96 L.Ed. 547 (1952), the Court declared: "So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." In *Galvan*, 347 U.S. at 531, 74 S. Ct. at 743, relied on in *Kleindienst*, 408 U.S. at 766-67, 92 S. Ct. at 2583-84, and *Fiallo*, 430 U.S. at 792-93 n. 4, 97 S. Ct. at 1478 n. 4, the Court opined: "[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

Upon more careful reading, however, one can distill from these decisions the Supreme Court's recognition of the constitutional limitations to Congress' plenary immigration authority. The *Fong Yue Ting* Court elaborated that immigration power must be exercised "consistent[ly] with the Constitution" and the judiciary must intervene where "required by the paramount law of the Constitution." 149 U.S. at 712, 713, 13 S. Ct. at 1021, 1022. The *Carlson* Court observed that "[t]he power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution'" 342 U.S. at 537, 72 S. Ct. at 532 (quoting *Fong Yue Ting*). And in *Galvan*, the Supreme Court noted that "since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen. . . ." 347 U.S. at 530, 74 S. Ct. at 742. Thus, even conceding Congress' authority in the immigration arena, we are not relieved of our duty

to ensure that Congress exercises its power within constitutional limits.

2. Government's Cases Not Involving First Amendment Challenges in the Deportation Setting

With the exception of *Harisiades*, the Government has not presented any case dealing squarely with an alien's First Amendment rights in the deportation context. Most of the cases involved Fifth Amendment due process challenges. *See Fong Yue Ting*, *supra* (Fifth Amendment due process challenge to an immigration law requiring deportation of Chinese laborers without certificates of residence); *Galvan*, *supra* (Fifth Amendment due process challenge to the Internal Security Act of 1950 providing for deportation of Communist Party members); *Mathews*, *supra* (Fifth Amendment due process attack on Social Security Act provisions granting eligibility for benefits to aliens under 65 years of age only if they have been admitted for permanent residence and have resided in the United States for five years); *Fiallo*, *supra* (Fifth Amendment due process challenge to Sections 101(b)(1), (b)(2) of the Immigration and Nationality Act denying preferential immigration status to illegitimate children and to fathers of illegitimate children); *see also Carlson*, *supra* (Fifth and Eighth Amendment challenge to provisions of the Internal Security Act of 1950 under which Communist Party members could be held in custody without bail).

In addition, several of the Government's "plenary power" cases centered on Congress' power to exclude aliens from our country's shores rather than its power to deport aliens lawfully residing in the country. Congress' power differs in the exclusion and deportation contexts. In the former, the government's decision to exclude an alien is all but conclusive on the courts, while in the latter an alien can look to the courts as a check on the government's power. The Supreme Court in *Kwong Hai Chew*, *supra*, elaborated on this distinction. Quoting Justice Murphy's concurrence in *Bridges v. Wixon*, 326 U.S. at 161, 65 S. Ct. at 1455 (Murphy, J., concurring), the Court stated: "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country, he becomes invested with the rights guaranteed by the Constitution to all people within our borders." 344 U.S. at 596-97 n. 5, 73 S. Ct. at 477 n. 5; *see also Verdugo-Urquidez*, 856 F.2d at 1222 ("an alien seeking admission to the United States enjoys no constitutional rights") (citing *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292, 24 S. Ct. 719, 723, 48 L.Ed. 979 (1904)).

Four of the Government's cases fall into the exclusion category. First, in *Turner*, *supra*, an alien excluded for being an anarchist challenged his exclusion on the ground that it violated the First Amendment. The Supreme Court denied his challenge, commenting that "those who are *excluded* cannot assert rights in general obtaining in a land to which they do not belong. . . ." 194 U.S. at 292, 24 S. Ct. at 723 (emphasis supplied). Second, in *Kleindienst*, *supra*, United States citizens claimed that the government's exclusion of an alien violated the First Amendment. The Supreme Court ruled that "Mandel [a foreign journalist] personally, as an *unadmitted* and nonresi-

dent alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." 408 U.S. at 762, 92 S. Ct. at 2581 (emphasis supplied). Third, *Fiallo, supra*, involved a congressionally mandated exclusion that harmed citizens' interests. Reiterating language from *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S. Ct. 671, 676, 53 L. Ed. 1013 (1909), the Supreme Court in *Fiallo* stated: "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the *admission* of aliens." 430 U.S. at 792, 97 S. Ct. at 1477 (emphasis supplied). Fourth, the Ninth Circuit in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111, 102 S. Ct. 3494, 73 L.Ed.2d 1373 (1982), faced the issue of whether Section 201 of the Immigration and Nationality Act of 1952, a preferential admissions standard based upon the existence of close family relationships, was unconstitutional as applied to the exclusion of one member of a homosexual couple. Upholding the law, the Ninth Circuit once again recognized Congress' broad exclusion powers, stating that "the power to *exclude* aliens is . . . a power to be exercised exclusively by the political branches of government." 673 F.2d at 1041 (emphasis supplied).

In all four cases above, the focus of the Supreme Court's inquiry was on the existence, or more appropriately, the nonexistence of alien's rights in the face of Congress' power to exclude. None addressed the issue before the Court today: the First Amendment rights of aliens in the deportation setting.

3. Harisiades v. Shaughnessy

Decided in 1952, *Harisiades v. Shaughnessy, supra*, involved an attack on the provision in the Alien Registration Act of 1940 that authorized deportation of aliens based on their past Communist Party memberships. The aliens assailed this provision on three grounds: the Fifth Amendment Due Process Clause, the First Amendment freedom of speech and assembly, and the prohibition of passing an ex post facto law under Article I, § 9, clause 3 of the Constitution.

The Supreme Court rejected the aliens' Fifth Amendment substantive due process arguments that permanent residence confers a "vested right" on the alien, equal to that of a citizen, to remain within the country and that the Alien Registration Act provision is unreasonably harsh. As it had done in previous cases, the Court deferred to the political branches in this area: "[Policies toward aliens] are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." 342 U.S. at 589, 72 S. Ct. at 519. The Government erroneously relies on language from *Harisiades'* Fifth Amendment discussion in support of its position that an alien's First Amendment rights are superceded in the deportation arena.

In addressing the aliens' First Amendment argument, the *Harisiades* Court dealt directly with the question of whether aliens have First Amendment rights in deportation matters. The Government, as in this case, urged the Court to find that the First Amendment does not apply "to the political decision of Congress to expel a class of aliens whom it deems

undesirable residents." 96 L.Ed. at 593 (quoting Brief for the United States). The Court rejected this argument, ruling that it had the duty of distinguishing between aliens' constitutionally protected "advocacy of political methods" and their unprotected "methodical but prudent incitement to violence." 342 U.S. at 592, 72 S. Ct. at 520. To make this distinction, the Court explicitly employed the then prevailing First Amendment test from *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951). 342 U.S. at 592 n. 18, 72 S. Ct. at 520 n. 18. Although the Court found that the First Amendment did not prevent the resident aliens' deportation, the importance of its ruling for the instant case is that the Court applied the same First Amendment standard to aliens' claims that then applied to United States citizens' First Amendment challenges.[12]

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[12] The Government's attempt to distinguish *Harisiades* is unpersuasive. It merely posits that the Court's ruling was not clear on its face and that it only utilized the test applicable to the Communist Party rather than the prevailing First Amendment test. In light of the Government's brief in *Harisiades* urging the Court not to apply First Amendment principles in the deportation context, the Court's recognition of its duty to distinguish between mere advocacy and speech that incites violence, and the Court's citation to *Dennis v. United States*, we must conclude that the Court found aliens in the deportation setting to have the same First Amendment rights as citizens. While several commentators have queried whether the Supreme Court correctly applied the *Dennis* test in *Harisiades*, *see* Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 202-05 (1987); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 Yale L.J. 262, 285 n. 153 (1959), we need not consider the Court's finding that the statute at issue survived First Amendment scrutiny. For our purposes, what is instructive is that the Court chose to apply First Amendment principles in the face of an express Government argument that it need not do so.

The *Harisiades* decision sets forth the proper analysis for examining constitutional challenges to deportation statutes. While the Court will defer to Congress's plenary immigration power in the substantive due process area, the Court will not accord Congress the same amount of deference in the First Amendment field. Had the *Harisiades* Court found that the Government's plenary immigration power required the same degree of judicial deference in all deportation challenges, it could have summarily dismissed the First Amendment attack in a sentence or two with a citation to its previous substantive due process discussion. Or the Court could have adopted in *toto* the language in Justice Frankfurter's concurrence that essentially abdicated all judicial responsibility for overseeing congressional actions in the deportation area. *Harisiades*, 342 U.S. at 596-98, 72 S. Ct. at 522-23 (Frankfurter, J., concurring). But the Court did not dismiss the First Amendment challenge in such a summary fashion. Instead, it addressed the aliens' First Amendment argument in a separate section and employed the *Dennis* test, the same First Amendment test then applicable to citizens. Thus, in the only case directly confronting aliens' First Amendment challenge to a deportation statute, the Supreme Court analyzed the aliens' claims in the same manner as if a citizen had brought the action.

4. Harisiades and the First Amendment

In *Harisiades*, the Supreme Court refused to recognize an alien-citizen distinction among speech and speakers in this country. This result accords

with the "profound national commitment" reflected by the First Amendment that "debate on public issues [be] uninhibited, robust, and wide-open, and that it [include] vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 720-21, 11 L. Ed. 2d 686 (1964); *see also Associated Press v. United States*, 326 U.S. 1, 20, 65 S. Ct. 1416, 1424-25, 89 L.Ed. 2013 (1945) (First Amendment designed to receive "the widest possible dissemination of information from diverse and antagonistic sources").

The First Amendment serves our national interests not only by preserving individual rights to speech but by ensuring that all speech from whatever source is protected. The maintenance of the "uninhibited marketplace of ideas," crucial for our democracy's prosperity, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S. Ct. 1794, 1806-07, 23 L. Ed. 2d 371 (1969), requires that each idea be afforded the same protection whether espoused by a citizen or an alien within this country. The Supreme Court affirmed this principle in the context of rejecting a different standard for a corporation's speech in *Pacific Gas & Electric v. California Public Utilities Commission*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (plurality). The Court there stated that "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . The identity of the speaker is not decisive in determining whether speech is protected." *Id.* at 8, 106 S. Ct. at 907 (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 1415, 55 L.Ed.2d 707

(1978)). Aliens in this country, like corporations or individuals, "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to further." *Id.* (quoting *Bellotti*, 435 U.S. at 783, 98 S. Ct. at 1419). Congress has acknowledged that "It is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States." H. Conf. Rep. No. 100-475, 100th Cong., 1st Sess. 163, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2314, 2370, 2424. As Judge Learned Hand stated, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

If corporate speech is protected for its contribution to vigorous public debate, then the speech of aliens must receive similar protection. For it defies reason and undermines the values underlying the First Amendment that a magazine article advocating doctrines of world communism or the unlawful damage, injury or destruction of property by the PFLP would be fully protected if published by a corporation or a citizen, but if authored or distributed by an alien could render the alien subject to the sanction of deportation.

5. No Different Bill of Rights for Aliens in the Deportation Setting

In the Government's view, a fundamentally "different" Bill of Rights applies to aliens seeking to avoid expulsion from the United States. The Gov-

ernment would have this Court rule that "in the limited context of deportation, the guarantees of the Bill of Rights are constitutionally irrelevant to the question of which non-citizens shall be permitted to remain within our borders." Gov't Supp. Memo. of May 19, 1987, at 27. To buttress this view, the Government cites a litany of decisions in which courts have limited aliens' constitutional rights in the deportation setting.[13] From these cases the Govern-

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[13] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39, 104 S. Ct. 3479, 3483-84, 82 L.Ed.2d 778 (1984) (Fourth Amendment based exclusionary rule); *Abel v. United States*, 362 U.S. 217, 233-34, 80 S. Ct. 683, 694-95, 4 L.Ed.2d 668 (1960) (arrests upon judicial warrant [an administrative order being sufficient]); *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1141 (9th Cir. 1981) (dismissal of proceedings resting upon constitutionally defective arrest); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54, 44 S. Ct. 54, 55-56, 68 L.Ed. 221 (1923) (Fifth Amendment privilege against self-incrimination); *INS v. Lopez-Mendoza*, 468 U.S. at 1043-44, 104 S. Ct. at 3485-86 (same); *Smith v. INS*, 585 F.2d 600, 602 (3d Cir. 1978) (same); *Trias-Hernandez v. INS*, 528 F.2d 366, 368-69 (9th Cir. 1975) (Fifth Amendment based right to "*Miranda*" warnings prior to custodial interrogation); *Bridges v. Wixon*, 144 F.2d 927, 936 (9th Cir. 1944) (Fifth Amendment protection against double jeopardy), *rev'd on other grounds*, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945); *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9th Cir. 1976) (Fifth Amendment based right to adjudication by an independent judicial officer), *cert. denied*, 429 U.S. 1044, 97 S. Ct. 748, 50 L.Ed.2d 757 (1977); *United States v. Dekermenjian*, 508 F.2d 812, 814 (9th Cir. 1974) (Fifth and Sixth Amendment based protection against in absentia adjudications); *Jay v. Boyd*, 351 U.S. 345, 357 n. 21, 360-61, 76 S. Ct. 919, 926 n. 21, 928-29, 100 L.Ed. 1242 (1956) (Fifth and Sixth Amendment based protection against discretionary adjudications based on undisclosed information); *Suciu v. INS*, 755 F.2d 127 (8th Cir. 1985) (same); *Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 532-33, 96 L.Ed. 547 (1952) (Sixth Amendment trial by jury);

ment would have us conclude that while aliens have First Amendment rights generally, within the deportation forum these rights are "irrelevant" and can be severely circumscribed. We find that none of the Government's cases supports this broad and far-reaching proposition.

In determining that a particular constitutional provision did not apply in the deportation context, the courts did not rely on a "different" Bill of Rights for aliens; nor did they base their decisions on the Government's plenary immigration power. Rather, each decision was based upon the court's examination of the precedent interpreting the particular constitutional right at issue and upon its conclusion that the particular right had no application in the deportation setting. The results would be the same in analogous situations outside the immigration arena.

Many of the cases dismissed constitutional challenges on the ground that the right asserted was available only in *criminal* proceedings. Since deportation has always been held to be a civil proceeding, *see Lopez-Mendoza*, 468 U.S. at 1038, 104 S. Ct. at 3483 ("A deportation proceeding is a purely civil

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Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977) (Sixth Amendment right to counsel); *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (Sixth Amendment based protection against interrogation in the absence of counsel), *cert. denied*, 400 U.S. 854, 91 S. Ct. 72, 27 L.Ed.2d 92 (1970); *Carlson v. Landon*, 342 U.S. at 544-56, 72 S.Ct. at 536-42 (Eighth Amendment protection against excessive bail); *Chabolla-Delgado v. INS*, 384 F.2d 360 (9th Cir.1967) (Eighth Amendment based bar to expulsion as cruel and unusual punishment), *cert. denied*, 393 U.S. 865, 89 S. Ct. 147, 21 L. Ed. 2d 133 (1968); *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742-43, 98 L.Ed. 911 (1954) (Article I, § 9 protection against ex post facto laws).

action to determine eligibility to remain in this country, not to punish an unlawful entry . . ."), the alien could not make a successful challenge.[14] Citizens, too, are not entitled to these rights in the civil context.[15]

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[14] *See Bilokumsky*, 263 U.S. at 155, 44 S.Ct. at 56 ("since the [deportation] proceeding was not a criminal one," Fifth Amendment privilege of criminal defendant not to testify does not apply); *Lopez-Mendoza*, 468 U.S. at 1043-44, 104 S. Ct. at 3485-86 (same); *Smith*, 585 F.2d at 602 (same); *Trias-Hernandez*, 528 F.2d at 368-69 ("civil nature of deportation proceeding is significant" in court's determination that *Miranda* warning are not necessary prior to custodial interrogation); *Bridges*, 144 F.2d at 936 ("The principle of double jeopardy applies only to criminal proceedings"); *Ramirez*, 550 F.2d at 563 (in holding that Sixth Amendment's guarantee of the right to counsel is not applicable to deportation proceedings, court begins "by repeating once more that a deportation hearing is a proceeding that is civil, not criminal, in nature"); *Lavoie*, 418 F.2d at 734 (since "deportation proceedings are civil and not criminal, in nature," Sixth Amendment safeguards "requiring the presence of counsel during interrogation" are not applicable).

[15] *See e.g., Roach v. N.T.S.B.*, 804 F.2d 1147, 1152-55 (10th Cir. 1986) (no Fifth Amendment privilege not to testify in civil administrative investigation), *cert. denied*, 486 U.S. 1006, 108 S. Ct. 1732, 100 L.Ed.2d 195 (1988); *Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1578 n. 6 (11th Cir. 1986) (*Miranda* warnings not required in non-custodial setting of administrative investigation; no Sixth Amendment right to counsel during interrogation in non-criminal setting); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66, 104 S. Ct. 1099, 1104-05, 79 L.Ed.2d 361 (1984) (protection against Double Jeopardy does not apply in civil forfeiture proceedings); *Wolfolk v. Riviera*, 729 F.2d 1114, 1119-20 (7th Cir. 1984) (no right to counsel in civil cases); *see also United States v. 5,644,540 in United States Currency*, 799 F.2d 1357,

In other cases, the courts dismissed the constitutional challenge because deportation has never been held to constitute punishment.[16] *See Bugajewitz v. Adams*, 228 U.S. 585, 591, 33 S. Ct. 607, 608, 57 L.Ed. 978 (1913) (deportation is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want"). Again, citizens do not enjoy these rights in a non-punitive setting.[17]

In the final group of decisions, although the courts did not reach their conclusions based upon the civil, non-punitive nature of a deportation proceeding, they nevertheless employed the same analysis that would apply were a citizen making a similar constitutional challenge. For instance, in holding that an illegal arrest has no bearing on a subsequent deportation proceeding, the *Lopez-Mendoza* Court noted that

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1364 n. 8 (9th Cir. 1986) (prohibition against ex post facto laws does not apply in civil forfeiture proceeding).

[16] *Chabolla-Delgado*, 384 F.2d at 360 ("Deportation is not punishment within the meaning of the Eighth Amendment); *Galvan*, 347 U.S. at 531, 74 S. Ct. at 743 (Ex Post Facto Clause does not apply to deportation proceedings); *Harisiades*, 342 U.S. at 594-95, 72 S. Ct. at 521-22 (Ex Post Facto Clause does not apply to deportation because "deportation, while it may be burdensome and severe for the alien, is not a punishment").

[17] *See e.g., Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977) (Eighth Amendment only applies to criminal punishment, not corporal punishment by school authorities); *Palermo v. Rorex*, 806 F.2d 1266, 1271 (8th Cir. 1987) (Eighth Amendment Cruel and Unusual Punishment Clause applies only in criminal actions following conviction), *cert. denied*, 484 U.S. 819, 108 S. Ct. 77, 98 L.Ed.2d 40 (1988); *Pace* v. *United States*, 595 F.Supp. 399, 402 (S.D. Tex. 1984) (denial of Social Security benefits does not violate Cruel and Unusual Punishment Clause because denial does not constitute punishment).

"[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 468 U.S. at 1039, 1040, 104 S. Ct. at 3483, 3484 (emphasis supplied). *See also Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1141 (9th Cir. 1981) (same); *Medina-Sandoval v. INS*, 524 F.2d 658, 659 (9th Cir. 1975) (same). Similarly, in determining that the Fourth Amendment based exclusionary rule does not apply to deportation proceedings, the *Lopez-Mendoza* Court employed the cost-benefit balancing test set forth in *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L.Ed.2d 1046 (1976), a case involving a Fourth Amendment challenge outside the immigration area. Additionally, in holding that the Eighth Amendment bail clause did not prevent the denial of bail to an alien, the Supreme Court in *Carlson v. Landon*, 342 U.S. at 545, 72 S. Ct. at 537, noted that "[t]he Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." *See also United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (upholding provisions of Bail Reform Act of 1984 allowing for the denial of bail in certain circumstances).

In *Harisiades*, the Supreme Court applied to aliens the same First Amendment test then applicable to citizens. The decisions cited by the Government and discussed above follow the *Harisiades* approach. Rather than supporting a "different" Bill of Rights for aliens in the deportation setting, these cases merely employed the same methods of constitutional adjudication available to citizens and concluded that

the particular rights at issue had no application in the deportation area.

6. No Lower First Amendment Standard for Aliens in the Deportation Setting

Notwithstanding *Harisiades*, the Government urges us to adopt a lower First Amendment standard for aliens in the deportation arena. In support of this argument, the Government cites several decisions in which the Supreme Court has applied lower First Amendment scrutiny in limited contexts. For example, a prisoner retains only those First Amendment rights that are not "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). Similarly, while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L.Ed.2d 731 (1969), "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3159, 3164, 92 L.Ed.2d 549 (1986). The Supreme Court has also recognized that "[f]or the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker v.*

Levy, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L.Ed. 2d 439 (1974).

The Government argues from these decisions that "if school children and military personnel [and prisoners] may be restricted in the exercise of their First Amendment rights, it is hardly surprising that Congress can specify a ground for deportation which touches First Amendment concerns." Gov't Supp. Memo. of May 19, 1987, at 41. We disagree. In each of the above areas—prisons, schools, and the military—the Supreme Court adopted a lower First Amendment standard because of the significant governmental interest asserted. This lower standard of review applies, however, only when a plaintiff is present in the settings at issue. Thus, the prison standard applies only to inmates under prison authority; the school standard applies only while children are in school; and the military standard applies only to servicemen during their time in the military.

In none of these decisions does the lesser degree of First Amendment protection have any effect on the individual's constitutional rights *outside* the limited environment. The warden cannot prevent a prisoner from having an interview with the media once she has served her time; the school principal cannot punish students for using profanity during their summer vacations; and the military cannot court martial a doctor for speaking out against U.S. foreign policy once his military commitment is over.

By contrast, it is impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting. Under a lower First Amendment standard, and without the constitutional protection against ex post facto laws, the Government could conceivably pass a law allowing for the deportation of aliens for statements made several decades earlier. An alien would have no way of knowing whether his or her speech would someday become a ground for deportation and consequently would be chilled from speaking at all.

Simply stated, the Government's view is that aliens are free to say whatever they wish but the Government maintains the ability to deport them for the content of their speech. To state the proposition is to reject it. As Justice Murphy wrote over forty years ago:

> Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him.

Bridges v. Wixon, 326 U.S. at 162, 65 S. Ct. at 1456 (Murphy, J., concurring). Like Justice Murphy, we cannot agree that "the Constitution meant to make such an empty mockery of human freedom." *Id.* Since aliens enjoy full First Amendment protection outside

the deportation setting, we decline to adopt a lesser First Amendment test for use within that setting.[18]

B. *Plaintiffs' First Amendment Challenge to the McCarran-Walter Provisions*

Plaintiffs challenge the McCarran-Walter provisions as being substantially overbroad in violation of the First Amendment. Having concluded that aliens have the same First Amendment rights as citizens, and that these rights are not limited in the deportation context, we now address that challenge.

The Supreme Court recently considered the overbreadth doctrine in *City of Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398 (1987):

> The elements of First Amendment overbreadth analysis are familiar. Only a statute that is

[18] We do not dispute the Government's interests in preserving national security and promoting foreign policy in the exercise of its immigration power. These interests are adequately protected, however, by the prevailing First Amendment standard allowing for the deportation of individuals who advocate imminent lawless action and whose speech is likely to induce such action. *See Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L.Ed.2d 430 (1969). The Government could also deport aliens, without violating the First Amendment, for their affiliation with an organization, if it established that that group affilition posed a legitimate threat to the government. *See Healy v. James*, 408 U.S. 169, 186, 92 S. Ct. 2338, 2348, 33 L. Ed. 2d 266 (1972); *United States v. Robel*, 389 U.S. 258, 265-66, 88 S.Ct. 419, 424-25, 19 L.Ed.2d 508 (1967). In addition, as long as the Government narrowly tailors its deportation laws to further its compelling interests in foreign policy and national security, it can enact laws, (*e.g.*, espionage or national secrecy laws), that allow for the deportation of aliens on the basis of their First Amendment activities. Thus, there is no basis for a lower standard of First Amendment protection for aliens.

> substantially overbroad may be invalidated on its face. *New York v. Ferber*, 458 U.S. 747, 769 [102 S. Ct. 3348, 3361, 73 L.Ed.2d 1113] (1982); *Broadrick v. Oklahoma*, [413 U.S. 601, 615, 93 S. Ct. 2908, 2917, 37 L.Ed.2d 830 (1973)]. "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . ." *id.* at 630 [93 S. Ct. at 2925] (BRENNAN, J., dissenting). Instead, "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 [102 S. Ct. 1186, 1191, 71 L.Ed.2d 362] (1982); *Kolender v. Lawson*, 461 U.S. 352, 359 n. 8 [103 S. Ct. 1855, 360 n. 8, 75 L. Ed. 2d 903] (1983).

The rationale for the doctrine was stated in *NAACP v. Button*, 371 U.S. at 433, 83 S. Ct. at 338 (citations omitted): "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Under *Hill*, we examine whether the McCarran-Walter provisions reach a "substantial amount of constitutionally protected conduct," by failing to make a distinction between lawful behavior and the more narrow scope of impermissible conduct not protected by the Constitution. In *Yates v. United*

States, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed.2d 1356 (1957), the Supreme Court considered what type of limits the government could place on First Amendment activities. Interpreting the Smith Act of 1940, the Court held that to be constitutional, the statute could only apply to "advocacy of action for the overthrow of government by force and violence." *Yates*, 354 U.S. at 324, 77 S. Ct. at 1079-80 (emphasis supplied). The Court distinguished advocacy of action from advocacy of belief, stating that "[t]he essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now and not in the future, rather than merely *believe* in something." *Id.* at 324-25, 77 S. Ct. 1079-80 (emphasis in original).

Over a decade later in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969), the Supreme Court articulated the standard governing what constitutes permissible and impermissible conduct in the area of speech advocating unlawful action. Consistent with the First Amendment, the government may only prohibit advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Id.* at 447, 89 S. Ct. at 1829. The Court has repeatedly emphasized that the incitement must be to imminent lawless action. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 108, 94 S. Ct. 326, 328, 38 L.Ed.2d 303 (1973) (conviction for disorderly conduct during campus protest reversed where statements "amounted to nothing more than advocacy of illegal action at some future time").

Like the Supreme Court in *Harisiades*, we review the deportation statute employing the prevailing First Amendment standard. Under this standard, the

Brandenburg test, the McCarran-Walter provisions are substantially overbroad. Section 241(a)(6)(G)(v) ("Section (G)(v)") allows for the deportation of aliens who write, publish, or knowingly circulate, distribute, print, display, or possess any material advocating or teaching opposition to all organized government, the economic, international, and governmental doctrines of world communism, or the establishment in the United States of a totalitarian dictatorship. Section 241(a)(6)(H) ("Section (H)") allows for the deportation of aliens who are members of or affiliated with any organization that engages in the proscribed activities in Section (G). These provisions proscribe almost exclusively activity protected by the First Amendment. Simply writing, publishing circulating, distributing, printing, displaying, and possessing material advocating or teaching the prohibited ideologies cannot be equated with advocacy of imminent unlawful action. As stated in *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520- 21, 6 L.Ed.2d 836 (1961), "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

The other McCarran-Walter provisions are even more substantially overbroad than Sections (G)(v) and (H). Section 241(a)(6)(D) ("Section (D)") allows for the deportation of aliens who "advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization" that so advocates, "either through its own utterances or

through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization. . . ." Section (F)(iii) allows the deportation of "[a]liens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . the unlawful damage, injury or destruction of property."

While Sections (G)(v) and (H) deal with advocacy and affiliation through the printed medium, Sections (D) and (F)(iii) proscribe advocacy and affiliation more generally. Like Sections (G)(v) and (H), though, Sections (D) and (F)(iii) do not differentiate between constitutionally permissible and impermissible activities. These provisions could as easily be applied to prohibit an alien from wearing a PFLP button, attending a PFLP lecture, distributing a PFLP newspaper, or teaching a PFLP viewpoint as they could be employed to prevent advocacy of imminent lawless action.

It takes no searching inquiry to conclude that, judged according to the prevailing *Brandenburg* test, the challenged provisions cannot pass constitutional muster. Accordingly, we hold that the McCarran-Walter provisions are substantially overbroad and violate the First Amendment.[19]

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[19] Plaintiffs have also asked this Court to address the constitutionality of Sections 901(a) and 901(b) of the FRAA. The former is challenged by immigrant aliens who claim that the denial of Section 901(a) protection to them violates the equal protection component of the Fifth Amendment Due Process Clause. The latter, specifically the PLO Exception, is challenged by nonimmigrant aliens also on Fifth Amendment grounds. Although we did address this latter challenge in our ruling in court on December 22, 1988, at that time we did not reach the question of whether nonimmigrant aliens were entitled to First Amendment protection. Since we now find that the First Amendment protects all aliens, it is no longer necessary to consider the constitutionality of Section 901 of the FRAA.

CONCLUSION

In sum, we hold that aliens who are legally within the United States . . . the United States are protected by the First Amendment and that their First Amendment rights are not limited by the Government's plenary immigration power. Applying established First Amendment principles, we further hold that the McCarran-Walter provisions are substantially overbroad in contravention of the First Amendment.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-55929, 97-55479

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL., PLAINTIFFS
AND
AIAD BARAKAT; NAIM SHARIF; KHADER MUSA HAMIDE; NUANGUGI JULIE MUNGAI; AYM MUSTAFA OBEID; AMJAD OBEID; MICHEL IBRAHIM SHEHADEH; BASHAR AMER, PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL; HAROLD EZELL; C.M. MCCULLOUGH; DORIS MEISSNER, COMMISSIONER, INS; ERNEST E. GUSTAFSON, PERSONALLY AND IN HIS CAPACITY AS PAST DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE; RICHARD K. ROGERS, DISTRICT DIRECTOR, PERSONALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE; GILBERT REEVES, PERSONALLY AND IN HIS CAPACITY AS AN OFFICER OF THE IMMIGRATION AND NATURALIZATION SERVICE; IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

[Filed Dec. 23, 1997]

Before: D.W. NELSON and CANBY, Circuit Judges, and TANNER,* District Judge.

ORDER

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and all recommended rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI and KLEINFELD, Circuit Judges, join, dissenting from denial of rehearing en banc:

Congress unambiguously revoked judicial review of deportation proceedings—with but one exception—when it passed, and the President signed into law, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996). Today, the Ninth Circuit nullifies the express intent of the elected branches of our government by carving out yet another exception, one which is neither contemplated nor permitted by the plain language of the statute. In so doing, we are in tension with the two other circuits which have

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* The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

addressed IIRIRA's jurisdiction-stripping provisions, see *Auguste v. Attorney General*, 118 F.3d 723 (11th Cir. 1997); *Ramallo v. Reno*, 114 F.3d 1210 (D.C. Cir.1997), as well as a prior decision of this court itself, *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996). Because I fear today's action inflicts mischief on the sound administration of our nation's immigration laws in the nine western states, I respectfully dissent from the court's decision not to review this case en banc.

I

In IIRIRA, Congress stated:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g) (emphasis added). As the opening clause suggests, Congress's elimination of jurisdiction over removal cases is not absolute. Another portion of section 1252, with unmistakable clarity, limits the number of exceptions to but one:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (emphasis added).

At the risk of belaboring the obvious, when Congress says "only," it usually means "only." The only permitted judicial review of removal proceedings is the review of final orders. Under the plain language of IIRIRA, decisions by the Attorney General to commence proceedings and to adjudicate cases are simply not reviewable until the final order stage.

Nevertheless, this court now "finds" a second exception,[1] because "[a]ny other reading would present serious constitutional problems." *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997). Our circuit apparently believes that the narrowing of judicial review of deportation proceedings may violate the Constitution. To avoid these perceived problems, the court called upon "the well-established principle that where possible,

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[1] The opinion locates this exception in § 1252(f)(1), which reads:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). Contrary to the panel's interpretation, subsection (f) is not a grant of jurisdiction of any kind, but rather an additional restriction on jurisdiction that applies unless proceedings have been brought against an individual alien under part IV of this subchapter. Appropriately, subsection (f) is entitled "Limit on injunctive relief." The exception within this subsection is clearly only an exception to this subsection.

jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims." *Id.* at 1372 (emphasis added).

With respect, the opinion's reliance on this principle of constitutional avoidance—interpreting statutes to avoid perceived constitutional infirmities—is without foundation in the facts of this case. As the opinion itself admits, the principle is to be invoked only "where possible." Whatever the merits of constitutional avoidance might be, no court may "avoid" a perceived conflict when the text is unambiguous, as it is here. The avoidance canon, invoked with such abandon, amounts to nothing less than rewriting the statute.[2]

Moreover, judicial decisions based on constitutional avoidance are all the more suspect, quite frankly, when there is no constitutional infirmity to avoid. That is precisely the scenario in this case. As the Supreme Court has stated:

> Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.

Carlson v. Landon, 342 U.S. 524, 533, 72 S. Ct. 525, 96 L. Ed. 547 (1951) (emphasis added). Just four years ago, the Supreme Court reminded us that, "[f]or reasons long recognized as valid, the responsibility for

[2] To be sure, it is the duty of the courts, when they have jurisdiction, to declare unconstitutional any law that violates a protected right. Even then, the power to strike down a statute as unconstitutional does not include the power to amend it. See Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74, 97-98.

regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. [O]ver no conceivable subject is the legislative power of Congress more complete." *Reno v. Flores*, 507 U.S. 292, 305, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976); *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977)) (internal quotation marks omitted) (citations omitted) (alteration in original). Heeding these very words, this court has previously declared that "aliens have no constitutional right to judicial review of deportation orders." *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996).

But alas, today's decision now creates an exception to this long-established rule. According to the opinion, the distinguishing factor in this case is that the plaintiffs have raised a First Amendment claim of selective enforcement. What the opinion overlooks, however, is that such exception swallows the constitutional principle. To fit within the exception, a potential deportee need only assert a First Amendment violation. Even if the claim were frivolous, no court can so rule until after obtaining jurisdiction. Because the question of jurisdiction logically precedes the question of merit, today's decision, which purports to expand jurisdiction only to meritorious First Amendment claims, actually broadens jurisdiction to all such claims, frivolous and meritorious alike. By artful pleading, a potential deportee now is entitled to judicial review notwithstanding the statute and the cases holding that there exists no constitutional right to judicial review in deportation matters. Noth-

ing could be more contrary to both Supreme Court precedent and this court's decision in Duldulao.[3]

II

By finding a constitutional infirmity where none exists and then engrafting onto the statute an exception of our own creation, we undermine the unambiguous intent of Congress.

I respectfully dissent.

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[3] Not surprisingly, the only other circuits to have dealt with the issue have upheld IIRIRA's limitations on federal court jurisdiction. See *Auguste*, 118 F.3d at 726-27; *Ramallo*, 114 F.3d at 1214.

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1252 of Title 8, United States Code (Supp. II 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(a), 110 Stat. 3009-607 to 3009-612, provides in pertinent part:

> **[(b)](9) Consolidation of questions for judicial review.**
>
> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.
>
> * * * * *
>
> **(f) Limit on injunctive relief.—**
>
> (1) In general.
>
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing

the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1231], as amended by the [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

* * * * *

(g) Exclusive jurisdiction.

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

3. Section 306(c)(1) of IIRIRA, 110 Stat. 3009-612, as amended by the Act of October 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656 (technical corrections), provides:

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that [8 U.S.C. 1252(g)] (as added by subsection (a)) shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

4. Section 309(c)(1) of IIRIRA, 110 Stat. 3009-625, provides:

(c) TRANSITION FOR ALIENS IN PROCEDURES.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.